

**OFFICE COPY**

**TRANSCRIPT OF RECORD**

---

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1959 / 1960**

**No. ~~005~~ 24**

**UNITED STATES, PETITIONER**

**VS.**

**E. B. HOUGHAM, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT**

**Petition for certiorari filed December 21, 1959  
Certiorari granted February 23, 1960**

---

No. 15873

---

**United States  
Court of Appeals**  
for the Ninth Circuit

**UNITED STATES OF AMERICA,**  
Appellant,  
vs.

**E. B. HOUGHAM, OWEN DAILEY, WILLIAM  
E. SCHWARTZE and HARLAN L. Mc-  
FARLAND,**

Appellees.

**E. B. HOUGHAM, OWEN DAILEY, WILLIAM  
E. SCHWARTZE and HARLAN L. Mc-  
FARLAND,**

Appellants,

vs.

**UNITED STATES OF AMERICA,**  
Appellee.

---

**Transcript of Record**

---

**Appeals from the United States District Court for the  
Southern District of California  
Northern Division.**

## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

|   | PAGE |
|---|------|
| Answer to Second Amended Complaint..... | 74   |
| Attorneys, Names and Addresses of.....  | 1    |
| Certificate by the Clerk.....           | 447  |
| Complaint .....                         | 3    |
| Complaint, Second Amended.....          | 55   |
| Exhibit, Defendants':                   |      |
| D—Three Documents from Government       |      |
| Files .....                             | 426  |
| Exhibits, Plaintiff's:                  |      |
| No. 1—Veteran's Application No. V10 A   |      |
| 55767, Application Statement by In-     |      |
| terviewer and Letter Dated July 30,     |      |
| 1946 .....                              | 127  |
| 2—Statement of Owen N. Dailey.....      | 133  |
| 76—Veteran's Application for Surplus    |      |
| Property .....                          | 206  |
| 94—Veteran's Application for Surplus    |      |
| Property .....                          | 218  |
| 95—Certificate for Veteran's Priority.. | 221  |
| 96—Statement of Harlan L. McFarland     | 222  |
| 97—Veteran's Application for Surplus    |      |
| Property .....                          | 227  |

| INDEX  | PAGE |
|--|------|
| Findings of Fact, Conclusions of Law and Judgment .....  | 105  |
| Conclusions of Law .....   | 114  |
| Findings of Fact .....   | 106  |
| Judgment .....   | 119  |
| Memorandum and Orders on Defendants' Motion to Dismiss and for Summary Judgment and Order on Plaintiff's Motion to File Second Amended Complaint ..... | 43   |
| Motion and Notice of Motion to File First Amended Complaint .....  | 23   |
| Ex. A—First Amended Complaint .....  | 25   |
| Notice of Appeal, Defendants' .....  | 122  |
| Notice of Appeal, Plaintiff's .....  | 121  |
| Pretrial Conference Order .....  | 88   |
| Statement of Points, Appellants' .....   | 450  |
| Statement of Points, Cross-Appellants' .....   | 451  |
| Transcript of Judge's Findings at Close of Case .....  | 437  |
| Transcript of Proceedings .....  | 123  |
| Witnesses, Defendants':  |      |
| Elgar, Wilburn   |      |
| —direct .....  | 327  |
| —cross .....   | 330  |
| McFarland, Harlan L.   |      |
| —direct .....  | 422  |

## INDEX

## PAGE

## Witnesses, Plaintiff's:

## Dailey, Owen N.

|                 |     |
|-----------------|-----|
| —direct .....   | 166 |
| —cross .....    | 191 |
| —redirect ..... | 202 |

## Galbreath, James J.

|               |          |
|---------------|----------|
| —direct ..... | 139, 206 |
|---------------|----------|

## Hougham, Edward B.

|                 |          |
|-----------------|----------|
| —direct .....   | 373, 393 |
| —cross .....    | 394      |
| —redirect ..... | 420      |

## Koenig, Karl F.

|                 |     |
|-----------------|-----|
| —direct .....   | 234 |
| —cross .....    | 258 |
| —redirect ..... | 271 |

## Lavine, Richard A.

|               |     |
|---------------|-----|
| —direct ..... | 141 |
| —cross .....  | 142 |

## McFarland, Harlan L.

|                 |               |
|-----------------|---------------|
| —direct .....   | 312, 331, 345 |
| —cross .....    | 347           |
| —redirect ..... | 362           |
| —recross .....  | 371           |

## Schwartz, William Erdwin

|               |     |
|---------------|-----|
| —direct ..... | 283 |
| —cross .....  | 305 |

Original Print

|   |     |     |
|---|-----|-----|
| Proceedings in the U.S.C.A. for the Ninth Circuit .....   | 452 | 453 |
| Minute entry of argument and submission (omitted in printing) ..  | 452 | 453 |
| Minute entry of order directing filing of opinion and filing and<br>recording of judgment (omitted in printing) ..... | 453 | 453 |
| Opinion, Fee, J. ....   | 454 | 453 |
| Judgment .....  | 459 | 458 |
| Minute entry of order denying petition for rehearing .....  | 460 | 459 |
| Clerk's certificate (omitted in printing) .....   | 461 | 459 |
| Order allowing certiorari .....   | 463 | 459 |

## **NAMES AND ADDRESSES OF ATTORNEYS**

### **For Appellants:**

**CONRON, HEARD & JAMES,  
CALVIN H. CONRON, JR.,**  
7 Habermfelde Building Arcade,  
Bakersfield, California.

### **For Appellee:**

**LAUGHLIN E. WATERS,**  
United States Attorney;  
**RICHARD A. LAVINE,**  
Assistant U. S. Attorney,  
600 Federal Building,  
Los Angeles 12, California.

**MORTON HOLLANDER,  
HERSHEL SHANKS,**  
Attorneys, Dept. of Justice,  
Washington 25, D. C.

*vs. E. B. Hougham, et al.*

3

United States District Court, Southern District  
of California, Northern Division

Civil No. 1423-ND

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. B. HOUGHAM, Individually and Doing Business as BAKERS MOTOR MARKET; OWEN DAILEY, an Individual; WILLIAM E. SCHWARTZE, an Individual; HARLAN L. McFARLAND, an Individual; FLOYD L. THOMPSON, an Individual; and EUGEN LEROY HOCHSTEDLER, an Individual,

Defendants.

COMPLAINT FOR DAMAGES FOR FRAUDULENT PURCHASE OF GOVERNMENT PROPERTY

(40 U.S.C.A. 489(b))

Plaintiff, United States of America, complains of the above-named defendants and for cause of action alleges as follows:

First Cause of Action

I.

This is a civil action brought by the United States of America, as plaintiff, under the provisions of Section 26(b) of the Surplus Property Act of 1944, 50 U.S.C. App. 1635(b), repealed and re-enacted as

Section 209(b) of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 239(b), and renumbered as [2\*] 40 U.S.C. 489(b), of which this Court has jurisdiction by virtue of the provisions of Section 26(c), of the Surplus Property Act of 1944, repealed and re-enacted as Section 209(c) of the Federal Property and Administrative Services Act of 1949.

## II.

The defendant, E. B. Hougham, is an individual and resides within the jurisdiction of this Court. At all times herein mentioned, said defendant was doing business under the fictitious firm name of Bakers Motor Market and within the jurisdiction of this Court.

## III.

The defendant, Owen Dailey, is an individual and resides within the jurisdiction of this Court.

## IV.

The Congress of the United States enacted the Surplus Property Act of 1944 in order to facilitate and regulate the orderly disposal of Government surplus property. Among other things, the Act was expressly designed to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business, and professional enterprises. Pursuant to this Act, the War Assets Administration, an agency of the United States, was duly authorized and directed to dispose of Government sur-

\*Page numbering appearing at foot of page of original Certified Transcript of Record.

plus property. The disposal program of the War Assets Administration included sales at which the only eligible purchasers were veterans of World War II. In order to be certified as an eligible purchaser and as a condition precedent to the same, a veteran had to certify and represent that the intended use of the surplus property was for specified restricted purposes, and, in certain instances, that he had the required occupational qualifications.

V.

During 1946, the defendants did use or engage in or caused to be used or engaged in certain fraudulent tricks, schemes and [3] devices, described hereinafter, for the purpose of securing or obtaining or aiding to secure or obtain Government property from the United States and/or the War Assets Administration in connection with the procurement, transfer, or disposition of property under the Surplus Property Act of 1944.

VI.

During 1946, the defendants did agree, combine, and conspire to use or engage in or cause to be used or engaged in certain fraudulent tricks, schemes and devices, described hereinafter, for the purpose of securing or obtaining or aiding to secure or obtain Government property from the United States and/or the War Assets Administration in connection with the procurement, transfer or disposition of property under the Surplus Property Act of 1944.

## VII.

The defendants, E. B. Hougham and Owen Dailey, employed the following fraudulent tricks, schemes, and devices to obtain surplus property from the United States:

(1) During the year 1946, the defendants, E. B. Hougham and Owen Dailey, induced, conspired, combined, and entered into agreements with one another to use the defendant Owen Dailey's veteran's priority certificate to obtain surplus property for the defendant, E. B. Hougham, from the War Assets Administration, an agency of the United States.

(2) During the year 1946, the defendants, E. B. Hougham and Owen Dailey, attended War Assets Administration sales for veterans only. The defendant, E. B. Hougham, selected and paid for the following trucks and trailers, which were purchased on the dates and for the amounts [4] indicated through the use of the defendant Owen Dailey's veteran's certificate for which service the defendant, E. B. Hougham, paid the defendant, Owen Dailey:

| Date    | Item   | Amount      |
|---------|--|-------------|
| 9-16-46 | Truck, Cargo, Ford, 1943, 1½-ton, Drive 4x4, W.B. 115", Model GTB, Serial & Engine #199809, Tag #5235                  | \$ 1,059.85 |
| 9-16-46 | Trailer, Full 4-Wheel bomb carrier, chassis 158"x34", 1944 Model MK 111, 1-ton, Various Mfgs. Ser No. 60550, Tag #1702 | 123.10      |
| 9-17-46 | Trailer, tank water, capacity 300 gal., by Rossman:  |             |

| Date    | Item    |            | Amount |
|---------|---------|------------|--------|
|         | Tag No. | Serial No. |        |
| 9-17-46 | 4244    | 7-469      | 175.00 |
|         | 4243    | 7-481      | 175.00 |
|         | 4228    | 7-797      | 175.00 |
|         | 4241    | 7-392      | 175.00 |
|         | 4245    | 7-718      | 175.00 |
|         | 4247    | 7-466      | 175.00 |
|         | 4246    | 7-509      | 175.00 |
|         | 4226    | 7-713      | 175.00 |
|         | 4230    | 7-482      | 175.00 |
|         | 4229    | 7-484      | 175.00 |
|         | 4227    | 7-724      | 175.00 |
|         | 4224    | 7-559      | 175.00 |
|         | 4223    | 7-704      | 175.00 |
|         | 4222    | 7-763      | 175.00 |

9-17-46 Trailer, bomb carrier, Anthony or Highway Trailer, 1-ton, 1943 Model MK 11, w/bomb rack:

| Tag No. | Serial No. |       |
|---------|------------|-------|
| 2240    | 68593      | 40.00 |
| 2237    | A1318373   | 40.00 |
| 2339    | 70215      | 40.00 |
| 2230    | 72055      | 40.00 |
| 2229    | 72975      | 40.00 |
| 2226    | 71605      | 40.00 |
| 2225    | 71670      | 40.00 |
| 2228    | 72982      | 40.00 |
| 2227    | 72764      | 40.00 |

9-17-46 Trailer, Tank 300-gal. water, Rosman:

| Tag No. | Serial No. |        |
|---------|------------|--------|
| 2352    | 5-12       | 175.00 |
| 2354    | 5-16       | 175.00 |
| 2351    | 5-18       | 175.00 |
| 2350    | 5-22       | 175.00 |
| 2349    | 5-15       | 175.00 |
| 2347    | 5-24       | 175.00 |
| 2362    | 5-74       | 175.00 |
| 2361    | 5-71       | 175.00 |
| 2360    | 5-77       | 175.00 |
| 2363    | 5-78       | 175.00 |
| 2364    | 5-70       | 175.00 |

| Date    | Item  | Amount   |
|---------|---|----------|
| 9-17-46 | Trailer: By Spem 1944, Cargo, 1-ton,<br>steel parking wheel, single axel, wood<br>body with racks, no serial numbers: |          |
|         | Tag No.   |          |
|         | 4666  | 97.00    |
|         | 4664  | 97.00    |
|         | 4661  | 97.00    |
|         | 4663  | 97.00    |
|         | 4662  | 97.00    |
|         | 4642  | 97.00    |
|         | 4634  | 97.00    |
|         | 4618  | 97.00    |
|         | 4653  | 97.00    |
|         | 4655  | 97.00    |
|         | 4656  | 97.00    |
|         | 4600  | 97.00    |
|         | 4602  | 97.00    |
|         | 4640  | 97.00    |
|         | 4641  | 97.00    |
|         | 4625  | 97.00    |
|         | 4643  | 97.00    |
|         | 4629  | 97.00    |
|         | 4631  | 97.00    |
|         | 4680  | 97.00    |
|         | 4688  | 97.00    |
|         | 4689  | 97.00    |
|         | 4682  | 97.00    |
|         | 4668  | 97.00    |
| 7-31-46 | Truck, 1942 1½-ton Chevrolet, Serial<br>#6NK07-7509, Motor #BV468230  | 1,084.57 |
| 8-1-46  | Truck, 1942 ¾-ton Dodge, Serial<br>#8154754, Motor #T214-28417  | 899.29   |
| 8-5-46  | Truck, 1941 ½-ton Dodge Ambu-<br>lance, Serial #8652882, Motor<br>#T207-10213   | 917.60   |
| 9-25-46 | Jeep, 1942 Ford, Serial #7226,<br>Motor #MB183656   | 498.45   |

| Date     | Item   | Amount      |
|----------|--|-------------|
| 9-30-46  | Truck, 1940 Dodge, 1/2 Weapon Carrier, Serial #8642955, Motor #T202-2874   | 333.23      |
| 9-30-46  | Truck, 1942 Dodge, 3/4-ton Ambulance, Serial #8155-5692, Motor #T214-22624 | 834.85      |
| 9-30-46  | Truck, 1943 Dodge, 3/4-ton Recon. Serial #81575481, Motor #T214-46311      | 694.08      |
| 9-30-46  | Truck, 1940 Dodge, 1/2-ton Pickup, Serial #8641482, Motor #T202-108300     | 163.19      |
| 11-26-46 | Truck, 1941 GMC, 1 1/2-ton, Van Body, Serial #091, Motor #24820750         | 1,066.45    |
| Total    |  | \$14,737.46 |

(3) The War Assets Administration sales were limited to World War II veterans holding certificates to purchase for their personal use only. The defendant, [8] E. B. Hougham, caused the defendant, Owen Dailey, to certify and represent to the War Assets Administration that the aforesaid surplus property was being bought for the defendant Owen Dailey's personal use.

(4) The aforesaid certification and representation were false since in fact the said property was being purchased by the defendant, Owen Dailey, for the defendant, E. B. Hougham, and not for the defendant Owen Dailey's personal use.

#### VIII.

By reason of the premises and pursuant to the provisions of Section 26 (b) of the Surplus Prop-

erty Act of 1944, repealed and re-enacted as Section 209(b) of the Federal Property and Administrative Services Act of 1946, the defendants became and are liable to pay to the United States the sum of \$2,000.00 for each act committed by them in violation of the said statute and double the amount of the undertermined damages which the United States has sustained by reason thereof, together with interest and costs of this suit.

### Second Cause of Action

#### I.

Plaintiff, United States of America, repeats and realleges as part of this cause of action each and all of the allegations contained in Paragraphs I, II, IV, V, VI, and VIII of its First Cause of Action and makes them a part hereof with like effect as if the same were set forth herein in full, and further alleges:

#### II.

The defendant, William E. Schwartz, is an individual and resides within the jurisdiction of this Court.

#### III.

The defendants, E. B. Hougham and William E. Schwartz, [9] employed the following fraudulent tricks, schemes, and devices to obtain surplus property from the United States:

(1) During the year 1946, the defendants, E. B. Hougham and William E. Schwartz, induced, con-

spired, combined, and entered into agreements with one another to use the defendant William E. Schwartz's veteran's priority certificate to obtain surplus property for the defendant, E. B. Hougham, from the War Assets Administration, an agency of the United States.

(2) During the year 1946, the defendants, E. B. Hougham and William E. Schwartz, attended War Assets Administration sales for veterans only. The defendant, E. B. Hougham, selected and paid for the following trucks and trailers, which were purchased on the dates and for the amounts indicated through the use of the defendant William E. Schwartz's veteran's certificate for which service the defendant, E. B. Hougham, paid the defendant, William E. Schwartz:

| Date    | Item  | Amount      |            |        |      |       |        |      |       |        |      |       |        |      |       |        |      |       |        |  |
|---------|---|-------------|------------|--------|------|-------|--------|------|-------|--------|------|-------|--------|------|-------|--------|------|-------|--------|--|
| 9-16-46 | Truck, Oilfield, International, 2½-ton, No cab, Model M5H-6, Serial #29942, Engine #30489, Tag #3961  | \$ 2,941.50 |            |        |      |       |        |      |       |        |      |       |        |      |       |        |      |       |        |  |
| 9-16-46 | Trailer, Bomb Carrier, 1-ton, Mod. 1, 1944, 4 Wheel w/bomb rack & Elec. brakes:   |             |            |        |      |       |        |      |       |        |      |       |        |      |       |        |      |       |        |  |
|         | <table border="1"> <thead> <tr> <th>Tag No.</th> <th>Serial No.</th> <th>Amount</th> </tr> </thead> <tbody> <tr> <td>1657</td> <td>57187</td> <td>120.10</td> </tr> <tr> <td>1653</td> <td>60542</td> <td>120.10</td> </tr> <tr> <td>1652</td> <td>56757</td> <td>120.10</td> </tr> <tr> <td>1662</td> <td>60548</td> <td>120.10</td> </tr> <tr> <td>1660</td> <td>56980</td> <td>120.10</td> </tr> </tbody> </table> | Tag No.     | Serial No. | Amount | 1657 | 57187 | 120.10 | 1653 | 60542 | 120.10 | 1652 | 56757 | 120.10 | 1662 | 60548 | 120.10 | 1660 | 56980 | 120.10 |  |
| Tag No. | Serial No.  | Amount      |            |        |      |       |        |      |       |        |      |       |        |      |       |        |      |       |        |  |
| 1657    | 57187   | 120.10      |            |        |      |       |        |      |       |        |      |       |        |      |       |        |      |       |        |  |
| 1653    | 60542   | 120.10      |            |        |      |       |        |      |       |        |      |       |        |      |       |        |      |       |        |  |
| 1652    | 56757   | 120.10      |            |        |      |       |        |      |       |        |      |       |        |      |       |        |      |       |        |  |
| 1662    | 60548   | 120.10      |            |        |      |       |        |      |       |        |      |       |        |      |       |        |      |       |        |  |
| 1660    | 56980   | 120.10      |            |        |      |       |        |      |       |        |      |       |        |      |       |        |      |       |        |  |
| 9-16-46 | Trailer, Bomb Carrier, Anthony or Highway Trailer, 1-ton, 1943 Model MK 11, w/bomb rack. Serial #70573, Tag #2242   | 40.00       |            |        |      |       |        |      |       |        |      |       |        |      |       |        |      |       |        |  |

*United States of America*

| Date    | Item   | Amount      |
|---------|--|-------------|
| 3- 4-46 | 1945 Freuhauf Low-bed Trailers:                                    |             |
|         | Serial No.   |             |
|         | 23929  | 2,220.87    |
|         | 23952  | 2,220.87    |
|         | 23932  | 2,220.87    |
|         | 18662  | 2,220.87    |
|         | 23927  | 2,220.87    |
| 3- 4-46 | 1942 Diamond T, 4-ton Truck:                                       |             |
|         | Serial No.   | Engine No.  |
|         | 968-A-0893   | 133095      |
|         | 968-A-1732   | 1200853     |
|         | 968-A-2422   | 1206863     |
|         | 968-A-2148   | 1203517     |
|         | 968-A-1446   | 134924      |
|         |  | 3,350.00    |
|         |  | 3,350.00    |
|         |  | 3,350.00    |
|         |  | 3,350.00    |
|         |  | 3,350.00    |
| 3-22-46 | Freuhauf Military 4-ton Trailer:                                   |             |
|         | Serial No.   |             |
|         | 79505  | 583.30      |
|         | 74447  | 583.30      |
|         | 79472  | 583.30      |
|         | 66762  | 583.30      |
|         | 66748  | 583.30      |
|         | 66715  | 583.30      |
|         | 98851  | 583.30      |
|         | 97005  | 583.30      |
| 6-26-46 | 1941 Dodge 1/2-ton Truck, Serial #8685927, Engine #T207-16682      | 399.90      |
| 7- 1-46 | 1942 Chevrolet 1 1/2-ton Truck, Serial #6NK07-7528, Engine #456004 | 1,016.82    |
| 8- 1-46 | 1940 Dodge 1 1/2-ton Truck, Serial #8642729, Engine #T207-3442     | 315.85      |
| 9-30-46 | Truck, 1/2-ton Dodge Weapon Carrier, Engine #T215-24851            | 295.81      |
| Total   |  | \$38,131.13 |

(3) The War Assets Administration sales were limited to World War II veterans holding certifi-

ates to purchase for their personal use only. The defendant, E. B. Hougham, caused the defendant, William E. Schwartz, to certify and represent to the War Assets Administration that the aforesaid surplus property was being bought for the defendant William E. Schwartz's personal use.

(4) The aforesaid certification and representation were false since in fact the said property was being purchased by the defendant, William E. Schwartz, for the defendant, E. B. Hougham, and not for the defendant William E. Schwartz's personal use. [12]

### Third Cause of Action

#### I.

Plaintiff, United States of America, repeats and realleges as part of this cause of action each and all of the allegations contained in Paragraphs I, II, IV, V, VI, and VIII of its First Cause of Action and makes them a part hereof with like effect as if the same were set forth herein in full, and further alleges:

#### II.

The defendant, Harlan L. McFarland, is an individual and resides within the jurisdiction of this Court.

#### III.

The defendants, E. B. Hougham and Harlan L. McFarland, employed the following fraudulent tricks, schemes, and devices to obtain surplus property from the United States:

(1) During the year 1946, the defendants, E. B. Hougham and Harlan L. McFarland, induced, conspired, combined, and entered into agreements with one another to use the defendant Harlan L. McFarland's veteran's priority certificate to obtain surplus property for the defendant E. B. Hougham, from the War Assets Administration, an agency of the United States.

(2) During the year 1946, the defendants, E. B. Hougham and Harlan L. McFarland, attended War Assets Administration sales for veterans only. The defendant, E. B. Hougham, selected and paid for the following trucks and trailers, which were purchased on the dates and for the amounts indicated through the use of the defendant Harlan L. McFarland's veteran's certificate for which service the defendant, E. B. Hougham, paid the defendant, Harlan L. McFarland. [13]

| Date   | Item  | Amount     |        |
|--------|---|------------|--------|
| 7-2-46 | Trailers, Highway Trailer Co., 1943, bomb rack, 1-ton W.B. 56", 4 wheels, tires 600x9 4-ply, Model MK 11: |            |        |
|        | Tag No.   | Serial No. |        |
|        | 1881  | 70125      | 125.60 |
|        | 1882  | 70071      | 125.60 |
|        | 1883  | 70069      | 125.60 |
|        | 1884  | A1322313   | 125.60 |
|        | 1879  | A1323267   | 125.60 |
|        | 1877  | A1323269   | 125.60 |
|        | 1878  | A1323342   | 125.60 |
|        | 1880  | 68562      | 125.60 |
|        | 1887  | Unknown    | 125.60 |
|        | 1888  | A1323082   | 125.60 |
|        | 1885  | Unknown    | 125.60 |
|        | 1886  | A1322315   | 125.60 |

| Date    | Item   | Amount   |
|---------|--|----------|
| 7- 2-46 | Trailer, Bomb Carrier, 1-ton, 1944,<br>Model 1, 4 Wheel, w/bomb rack &<br>electric brakes:                   |          |
|         | Tag No. Serial No.   |          |
|         | 1646 56958   | 307.93   |
|         | 1645 57703   | 307.93   |
|         | 1647 60989   | 307.93   |
|         | 1655 61352   | 307.93   |
|         | 1654 60998   | 307.93   |
|         | 1656 57945   | 307.93   |
| 9-16-46 | Trailer Tank, Rosman, 300 gallon<br>water:   |          |
|         | Tag No. Serial No.   |          |
|         | 2356 5-95  | 179.38   |
|         | 2357 5-69  | 179.38   |
|         | 2358 5-67  | 179.38   |
| 9-16-46 | Trailer, Bomb Carrier, 1-ton, Model<br>1, 1944, 4-Wheel, w/bomb rack &<br>electric brakes:                   |          |
|         | Tag No. Serial No.   |          |
|         | 1620 57433   | 123.10   |
|         | 1621 57274   | 123.10   |
| 9-16-46 | Truck, Oilfield, International, 2½-<br>ton, no cab, Model M5H6, Serial #33-<br>117, Engine #34437, Tag #3983 | 3,015.04 |
| 3-21-46 | Truck, 1942 Chevrolet, 1½-ton,<br>Serial #6NK21-334, Motor #BV480-<br>054                                    | 1,312.86 |
|         | Truck, 1943 Chevrolet, 1½-ton, Serial<br>#9NK33-3640, Motor #BV530844  | 1,476.96 |
| 4- 8-46 | Truck, 1941 Dodge, ½-ton, Serial<br>#8660792, Motor #T207-4712   | 615.00   |
|         | Truck, 1942 Dodge, ¾-ton, Serial<br>#81588893, Motor #T214-58225   | 590.46   |
|         | Truck, 1942 Dodge, ¾-ton, Serial<br>#81579658, Motor #T214-58716   | 533.11   |
|         | Truck, 1942 Dodge, ¾-ton, Serial<br>#81630672, Motor #T214-99856   | 626.46   |

*United States of America*

| Date    | Item  | Amount   |
|---------|---|----------|
|         | Truck, 1942 Dodge, 3/4-ton, Serial #81620373, Motor #T214-78615       | 608.01   |
|         | Truck, 1942 Dodge, 3/4-ton, Serial #81549669, Motor #T214-34198       | 436.86   |
|         | Truck, 1942 Dodge, 3/4-ton, Serial #81624965, Motor ?                 | 556.51   |
|         | Truck, 1942 Dodge, 3/4-ton, Serial #81576210, Motor #T214-85001       | 527.51   |
|         | Truck, 1942 Dodge, 3/4-ton, Serial #81572194, Motor #T214-39968       | 533.01   |
|         | Truck, 1942 Dodge, 3/4-ton, Serial #81545080, Motor #T214-22709       | 527.46   |
|         | Truck, 1942 Dodge, 3/4-ton, Serial #81576402, Motor #T214-50758       | 528.81   |
|         | Truck, 1942 Dodge, 3/4-ton, Serial #81547808, Motor #T214-29477       | 537.66   |
|         | Truck, 1942 Dodge, 3/4-ton, Serial #81621285, Motor #T214-80454       | 540.51   |
|         | Truck, 1942 Dodge, 3/4-ton, Serial #81574735, Motor #T214-46597       | 466.66   |
|         | Truck, 1942 Dodge, 3/4-ton, Serial #81548280, Motor #T214-57727       | 485.11   |
|         | Truck, 1942 Dodge, 3/4-ton, Serial #81549858, Motor ?                 | 416.86   |
|         | Truck, 1942 Dodge, 3/4-ton, Serial #81547648, Motor #T214-29321       | 463.21   |
|         | Truck, 1942 Dodge, 3/4-ton, Serial #81622743, Motor #T214-82388       | 525.51   |
|         | Truck, 1943 Dodge, 1/2-ton, Serial #81525152, Eng. #T214-246558       | 565.53   |
|         | Truck, 1941 Dodge, 1/2-ton, Serial #81507436, Motor #T215-2194        | 527.85   |
| 5- 9-46 | Truck, 1942 GMC, 2 1/2-ton, Serial #70132-A2, Motor #27091404         | 1,094.00 |
| 6-26-46 | Truck, 1942 GMC, 2 1/2-ton, Cargo, Serial #73290B1, Motor 270107179   | 1,486.05 |
| 7- 1-46 | Truck, 1943 Dodge, 3/4-ton, Serial #81635955, Motor #T214-111403      | 1,496.13 |
|         | Truck, 1942 Chevrolet, 1 1/2-ton, Serial #9NED6-5307, Motor #BV444884 | 1,124.70 |

| Date    | Item   | Amount      |
|---------|--|-------------|
| 7-31-46 | Truck, 1942 Chevrolet, 1½-ton, Serial #14NK20-1270, Motor #BV-172401 | 1,064.93    |
| 8-1-46  | Truck, 1942 Dodge, ¾-ton, Serial #81549056, Motor #?                 | 888.62      |
| Total   |  | \$27,710.51 |

(3) The War Assets Administration sales were limited to World War II veterans holding certificates to purchase for their personal use only. The defendant, E. B. Hougham, caused the defendant, Harlan L. McFarland, to certify and represent to the War Assets Administration that the aforesaid surplus property was being bought for the defendant Harlan L. McFarland's personal use.

(4) The aforesaid certification and representation were false since in fact the said property was being purchased by the defendant, Harlan L. McFarland, for the defendant, E. B. Hougham, and not for the defendant Harlan L. McFarland's personal use.

#### Fourth Cause of Action

##### I.

Plaintiff, United States of America, repeats and realleges as part of this cause of action each and all of the allegations contained in Paragraphs I, II, IV, V, VI, and VIII of its First Cause of Action and makes them a part hereof with like effect as if the same were set forth herein in full, and further alleges:

##### II.

The defendant, Floyd L. Thompson, is an individual and resides within the jurisdiction of this Court.

## III.

The defendants, E. B. Hougham and Floyd L. Thompson, [18] employed the following fraudulent tricks, schemes, and devices to obtain surplus property from the United States:

(1) During the year 1946, the defendants, E. B. Hougham and Floyd L. Thompson, induced, conspired, combined, and entered into agreements with one another to use the defendant Floyd L. Thompson's veteran's priority certificate to obtain surplus property for the defendant, E. B. Hougham, from the War Assets Administration, an agency of the United States.

(2) During the year 1946, the defendants, E. B. Hougham and Floyd L. Thompson, attended War Assets Administration sales for veterans only. The defendant, E. B. Hougham, selected and paid for the following trucks and trailers, which were purchased on the dates and for the amounts indicated through the use of the defendant Floyd L. Thompson's veteran's certificate for which service the defendant, E. B. Hougham, paid the defendant Floyd L. Thompson:

| Date    | Item  | Amount            |
|---------|---|-------------------|
| 9-16-46 | Trailer, Full, 4-Wheel, Bomb Carrier, Chassis, 158"x34", 1944, Model MK. 111, Mod. 1, 1-ton, Various Manufacturers, Serial No. 57461, Tag #1694 | \$ 123.10         |
|         | Truck, Oilfield International, 1945, Model M5H6, 2½-ton, No cab, Serial #28554, Engine #3914  | 3,015.04          |
| Total   |   | <u>\$3,138.14</u> |

(3) The War Assets Administration sales were limited to World War II veterans holding certificates to purchase for their personal use only. The defendant, E. B. Hougham, caused the defendant, Floyd L. Thompson, to certify and represent to the War Assets Administration that the aforesaid surplus property was being bought for the defendant Floyd L. Thompson's personal use.

(4) The aforesaid certification and representation were false since in fact the said property was being purchased by the defendant, Floyd L. Thompson, for the defendant, E. B. Hougham, and not for the defendant Floyd L. Thompson's personal use.

#### Fifth Cause of Action

##### I.

Plaintiff, United States of America, repeats and realleges as part of this cause of action each and all of the allegations contained in Paragraphs I, II, IV, V, VI, and VIII of its First Cause of Action and makes them a part hereof with like effect as if the same were set forth herein in full, and further alleges:

##### II.

The defendant, Eugene Leroy Hochstedler, is an individual and resides within the jurisdiction of this Court.

##### III.

The defendants, E. B. Hougham and Eugene Leroy Hochstedler, employed the following fraudulent

tricks, schemes, and devices to obtain surplus property from the United States:

(1) During the year 1946, the defendants, E. B. Hougham and Eugene Leroy Hochstedler, induced, conspired, [20] combined, and entered into agreements with one another to use the defendant Eugene Leroy Hochstedler's veteran's priority certificate to obtain surplus property for the defendant, E. B. Hougham, from the War Assets Administration, an agency of the United States.

(2) During the year 1946, the defendants, E. B. Hougham and Eugene Leroy Hochstedler, attended War Assets Administration sales for veterans only. The defendant, E. B. Hougham, selected and paid for the following surplus property, which was purchased on the dates and for the amounts indicated through the use of the defendant Eugene Leroy Hochstedler's veteran's certificate for which service the defendant, E. B. Hougham, paid the defendant, Eugene Leroy Hochstedler:

| Date    | Item   | Amount                  |
|---------|--|-------------------------|
| 6-12-46 | 14-tons Tires, various sizes at \$70.00 per ton  | \$ 980.00               |
| 9-16-46 | Truck, Dodge, Weapon Carrier, 3/4-ton, 98" W.B., Bows, Model WC51, Serial #81534813, Engine #T214-3282, 1942. Item #979, Tag #9082 | 519.91                  |
|         | Trailer, Full, 4-Wheel, Bomb Carrier, Chassis 158"x34", 1944, Model MK 111, 1-ton, Various Manufacturers:                          |                         |
|         | Tag No. 1688   | Serial No. 57400 123.10 |
|         | 1682   | 58231 123.10            |

| Date     | Item  | Amount      |
|----------|---|-------------|
|          | Tag No.      Serial No.   |             |
| 9-16-46  | 1691      56835   | 123.10      |
|          | 1690      58234   | 123.10      |
|          | 1689      57712   | 123.10      |
| 9-17-46  | 1704      57092   | 123.10      |
| 10-23-46 | 3 Tires, 1600x20, 18-ply, Earthmover<br>W/T and Flaps at \$114.20           | 432.60      |
| 11-18-46 | 5 Tires, 750x16, 6-ply, Reg. Tag<br>#7775                                   | 44.90       |
| 10-22-46 | 432 Tires and Tubes of various types,<br>sizes and prices                   | 9,765.96    |
| 11-20-46 | 4-tons Tires, Military repairable, 750x<br>20, 164 tires per ton, Tag #8292 | 280.00      |
| 5- 8-46  | 100 Storage Batteries, 6 Volt, Type<br>BB-221-U                             | 302.00      |
|          | 10 6:00x16 6-Ply Tires, T & B, M & S  | 94.30       |
| 5- 9-46  | 7-7:50x20 8-Ply Tires, T & B, M & S   | 149.94      |
| 10-23-46 | 15-tons Repairable Tires (App. 500<br>tires)                                | 45.00       |
| Total    |   | \$13,758.21 |

(3) The War Assets Administration sales were limited to World War II veterans holding certificates to purchase for their personal use only. The defendant, [22] E. B. Hougham, caused the defendant, Eugene Leroy Hochstedler, to certify and represent to the War Assets Administration that the aforesaid surplus property was being bought for the defendant Eugene Leroy Hochstedler's personal use.

(4) The aforesaid certification and representation were false since in fact the said property was being purchased by the defendant, Eugene Leroy Hochstedler, for the defendant, E. B. Hougham, and

not for the defendant Eugene Leroy Hochstedler's personal use.

Wherefore, the plaintiff demands judgment against the defendants as follows:

1. Against the defendant, Owen Dailey, on the First Cause of Action in the amount of \$138,000.00, plus double the amount of damages which this Court may deem, together with interest and costs of this suit.

2. Against the defendant, William E. Schwartz, on the Second Cause of Action in the amount of \$58,000.00, plus double the amount of damages which this Court may deem, together with interest and costs of this suit.

3. Against the defendant, Harlan L. McFarland, on the Third Cause of Action in the amount of \$104,000.00, plus double the amount of damages which this Court may deem, together with interest and costs of this suit.

4. Against the defendant, Floyd L. Thompson, on the Fourth Cause of Action in the amount of \$4,000.00, plus double the amount of damages which this Court may deem, together with interest and costs of this suit.

5. Against the defendant, Eugene Leroy Hochstedler, on the Fifth Cause of Action in the amount of \$32,000.00, plus double the amount of damages which this Court may deem, together [23] with interest and costs of this suit.

6. Against the defendant, E. B. Hougham, individually and doing business as Bakers Motor Market on all five Causes of Action in the amount of \$336,000.00, plus double the amount of damages which this Court may deem, together with interest and costs of this suit.

**LAUGHLIN E. WATERS,**  
United States Attorney;

**MAX F. DEUTZ,**  
United States Attorney;  
Chief of Civil Division;

/s/ **JOSEPH D. MULLENDER, JR.,**  
Assistant U. S. Attorney,  
Attorneys for Plaintiff.

[Endorsed]: Filed December 31, 1954. [24]

[Title of District Court and Cause.]

**MOTION AND NOTICE OF MOTION TO FILE  
FIRST AMENDED COMPLAINT**

**Motion**

Comes now the plaintiff, United States of America, and moves this Court, pursuant to Rule 15(a) of Federal Rules of Civil Procedure, for leave to file its First Amended Complaint.

The ground for this motion is that said amendment is made to conform to the proof which plaintiff

proposes to introduce at the time of trial in support of its claims for relief.

The motion will rely upon the moving papers, the pleadings and papers filed herein, and the proposed First Amended Complaint, a copy of which is attached hereto, marked Exhibit "A." [30]

**Notice of Motion**

To: Defendants E. B. Hougham, Owen Dailey,  
William E. Schwartz, Harlan L. McFarland,  
and their counsel of record.

You and each of you will please take notice that on Tuesday, November 13, 1956, at 10:00 a.m. or as soon thereafter as the matter can be heard, that plaintiff will move the above-entitled Court for leave to file its first amended complaint. Such motion shall be made before the Honorable Gilbert H. Jertberg, at the courtroom in the Federal Post Office and Courthouse Building, Fresno, California.

Dated: October 31, 1956.

LAUGHLIN E. WATERS,

United States Attorney;

MAX F. DUETZ,

Asst. U. S. Attorney,  
Chief of Civil Division;

/s/ RICHARD A. LAVINE,

Assistant U. S. Attorney,  
Attorneys for Plaintiff.

**EXHIBIT A**

**[Title of District Court and Cause.]**

**FIRST AMENDED COMPLAINT FOR DAMAGES FOR FRAUDULENT PURCHASE OF GOVERNMENT PROPERTY.**

**(40 U.S.C.A. 489(b))**

**Plaintiff, United States of America, complains of the above-named defendants and for cause of action alleges as follows in this first amended complaint.**

**Count One**

**I.**

This is a civil action brought by the United States of America, as plaintiff, under the provisions of Section 26(b) of the Surplus Property Act of 1944, 50 U.S.C. App. 1635(b), repealed and reenacted as Section 209(b) of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 239(b), and renumbered as 40 U.S.C. 489(b), of which this Court has jurisdiction by virtue of the provisions of Section 26(c), of the Surplus Property Act of 1944, repealed and reenacted as Section 209(c) of the Federal Property and Administrative [32] Services Act of 1949.

**II.**

The defendant, E. B. Hougham, is an individual and resides within the jurisdiction of this Court. At all times herein mentioned, said defendant was doing business under the fictitious firm name of

Bakers Motor Market and within the jurisdiction of this Court.

### III.

The defendant, Owen Dailey, is an individual and resides within the jurisdiction of this Court.

### IV.

The Congress of the United States enacted the Surplus Property Act of 1944 in order to facilitate and regulate the orderly disposal of Government surplus property. Among other things, the Act was expressly designed to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business, and professional enterprises. Pursuant to this Act, the War Assets Administration, an agency of the United States, was duly authorized and directed to dispose of Government surplus property. The disposal program of the War Assets Administration included the sales at which the only eligible purchasers were veterans of World War II. In order to be certified as an eligible purchaser and as a condition precedent to the same, a veteran had to certify and represent that the intended use of the surplus property was for specified restricted purposes, and, in certain instances, that he had the required occupational qualifications.

### V.

During 1946, the defendants did use or engage in or caused to be used or engaged in certain fraudulent tricks, schemes and devices, described herein-after, for the purpose of securing or obtaining or

aiding to secure or obtain [33] Government property from the United States and/or the War Assets Administration in connection with the procurement, transfer, or disposition of property under the Surplus Property Act of 1944.

VI.

During 1946, the defendants did agree, combine, and conspire to use or engage in or cause to be used or engaged in certain fraudulent tricks, schemes and devices, described hereinafter, for the purpose of securing or obtaining or aiding to secure or obtain Government property from the United States and/or the War Assets Administration in connection with the procurement, transfer or disposition of property under the Surplus Property Act of 1944.

VII.

The defendants, E. B. Hougham and Owen Dailey, employed the following fraudulent tricks, schemes, and devices to obtain surplus property from the United States:

(1) During the year 1946, the defendants, E. B. Hougham and Owen Dailey, induced, conspired, combined, and entered into agreements with one another to use the defendant Owen Dailey's veteran's priority certificate to obtain surplus property for the defendant, E. B. Hougham, from the War Assets Administration, an agency of the United States.

(2) During the year 1946, the defendants, E. B. Hougham and Owen Dailey, attended War Assets

Administration sales for veterans only. The defendant, E. B. Hougham, selected and paid for the following trucks and trailers, which were purchased on the dates and for the amounts indicated through the use of the defendant Owen Dailey's veteran's certificate for which service the defendant, E. B. Hougham, paid the defendant, Owen Dailey: [34]

|    | Date    | Item  | Amount      |
|----|---------|---|-------------|
| #1 | 9-16-46 | Truck, Cargo, Ford, 1943, 1½-ton, Drive 4x4, W.B. 115", Model GTB, Serial & Engine #199809, Tag #5235                     | \$ 1,059.85 |
| #2 | 9-16-46 | Trailer, Full 4-Wheel bomb carrier, chassis 158"x34", 1944 Model MK 111, 1-ton, Various Mfgs. Ser. No. 60-550, Tag. #1702 | 123.10      |
| #3 | 9-17-46 | Trailer, tank, water, capacity 300 gal., by Rossman:  |             |

| Tag No.  | Serial No. |        |
|----------|------------|--------|
| (a) 4244 | 7-469      | 175.00 |
| (b) 4243 | 7-481      | 175.00 |
| (c) 4228 | 7-797      | 175.00 |
| (d) 4241 | 7-392      | 175.00 |
| (e) 4245 | 7-718      | 175.00 |
| (f) 4247 | 7-466      | 175.00 |
| (g) 4246 | 7-509      | 175.00 |
| (h) 4226 | 7-713      | 175.00 |
| (i) 4230 | 7-482      | 175.00 |
| (j) 4229 | 7-484      | 175.00 |
| (k) 4227 | 7-724      | 175.00 |
| (l) 4224 | 7-559      | 175.00 |
| (m) 4223 | 7-704      | 175.00 |
| (n) 4222 | 7-763      | 175.00 |

#4 9-17-46 . Trailer, bomb carrier, Anthony or Highway Trailer, 1-ton, 1943 Model MK 11, W/bomb rack.

| Date | Item     |            | Amount  |
|------|----------|------------|---------|
|      | Tag No.  | Serial No. |         |
|      | (a) 2240 | 68593      | \$40.00 |
|      | (b) 2237 | A1318373   | 40.00   |
|      | (c) 2339 | 70215      | 40.00   |
|      | (d) 2230 | 72055      | 40.00   |
|      | (e) 2229 | 72975      | 40.00   |
|      | (f) 2226 | 71605      | 40.00   |
|      | (g) 2225 | 71670      | 40.00   |
|      | (h) 2228 | 72982      | 40.00   |
|      | (i) 2227 | 72764      | 40.00   |

#5 9-17-46 Trailer, Tank 300-gal. water,  
Rossman:

|  | Tag No.  | Serial No. |        |
|--|----------|------------|--------|
|  | (a) 2352 | 5-12       | 175.00 |
|  | (b) 2354 | 5-16       | 175.00 |
|  | (c) 2351 | 5-18       | 175.00 |
|  | (d) 2350 | 5-22       | 175.00 |
|  | (e) 2349 | 5-15       | 175.00 |
|  | (f) 2347 | 5-24       | 175.00 |
|  | (g) 2362 | 5-74       | 175.00 |
|  | (h) 2361 | 5-71       | 175.00 |
|  | (i) 2360 | 5-77       | 175.00 |
|  | (j) 2363 | 5-78       | 175.00 |
|  | (k) 2364 | 5-70       | 175.00 |

#6 9-17-46 Trailer: By Spem, 1944,  
Cargo, 1-ton, steel parking  
wheel, single axel, wood body  
with racks, no serial num-  
bers:

|  | Tag No.  |       |
|--|----------|-------|
|  | (a) 4666 | 97.00 |
|  | (b) 4664 | 97.00 |
|  | (c) 4661 | 97.00 |
|  | (d) 4663 | 97.00 |
|  | (e) 4662 | 97.00 |
|  | (f) 4642 | 97.00 |
|  | (g) 4634 | 97.00 |
|  | (h) 4618 | 97.00 |
|  | (i) 4653 | 97.00 |

## United States of America

|     | Date    | Tag No.  | Item   | Amount   |
|-----|---------|----------|--|----------|
|     |         | (j) 4655 |  | \$97.00  |
|     |         | (k) 4656 |  | 97.00    |
|     |         | (l) 4600 |  | 97.00    |
|     |         | (m) 4602 |  | 97.00    |
|     |         | (n) 4640 |  | 97.00    |
|     |         | (o) 4641 |  | 97.00    |
|     |         | (p) 4625 |  | 97.00    |
|     |         | (q) 4643 |  | 97.00    |
|     |         | (r) 4629 |  | 97.00    |
|     |         | (s) 4631 |  | 97.00    |
|     |         | (t) 4680 |  | 97.00    |
|     |         | (u) 4688 |  | 97.00    |
|     |         | (v) 4689 |  | 97.00    |
|     |         | (w) 4682 |  | 97.00    |
|     |         | (x) 4668 |  | 97.00    |
| #7  | 7-31-46 |          | Truck, 1942, 1½-ton Chevrolet, Serial #6NK07-7509, Motor #BV468230       | 1,084.57 |
| #8  | 8-1-46  |          | Truck, 1942, ¾-ton Dodge, Serial #8154754, Motor #T214-28417             | 899.29   |
| #9  | 8-5-46  |          | Truck, 1941 ½-ton Dodge Ambulance, Serial #8652-882, Motor #T207-10213   | 917.60   |
| #10 | 9-25-46 |          | Jeep, 1942 Ford, Serial #7226, Motor #MB183656                           | 498.45   |
| #11 | 9-30-46 |          | Truck, 1940 Dodge ½ Weapon Carrier, Serial #8642955, Motor #T202-2874    | 333.23   |
| #12 | 9-30-46 |          | Truck, 1942 Dodge, ¾-ton Ambulance, Serial #8155-5692, Motor #T214-22034 | 834.65   |
| #13 | 9-30-46 |          | Truck, 1943 Dodge, ¾-ton Recon. Serial #81575481, Motor #T214-46311      | 694.08   |

|       | Date    | Item   | Amount      |
|-------|---------|--|-------------|
| #14   | 9-30-46 | Truck, 1940 Dodge, 1/2-ton<br>Pickup, Serial #8641482,<br>Motor #T202-108300 | 163.19      |
| Total |         |  | \$13,671.02 |

(3) The War Assets Administration sales as described herein were limited to World War II veterans for their personal use or use in their own enterprise. The defendant, E. B. Hougham, caused the defendant, Owen Dailey, to certify and represent to the War Assets Administration that the aforesaid surplus property was being bought for the defendant Owen Dailey's personal use, or for use in Owen Dailey's own individual enterprise; and further to certify and represent that such an enterprise was at that time established, that Dailey was at that time operating it, that Dailey was the only person financially interested in the enterprise, that the funds for the enterprise were being put up by Dailey, that Dailey was not purchasing the property described for the benefit of any other enterprise, dealer, broker, merchant, or other undisclosed partner or principal; that the enterprise was one in which more than 50% of the invested capital or net income thereof was owned by or accrues [38] to Dailey, and that all the statements made in the application were true and complete to the best of the knowledge and belief of Dailey. That defendant Dailey did so represent and certify to the United States.

(4) That the aforesaid certification and representations were false and were known by defend-

ants Hougham and Dailey to be false at the time said certification and representations were made.

### VIII.

By reason of the premises and pursuant to the provisions of Section 26(b) of the Surplus Property Act of 1944, repealed and re-enacted as Section 209(b) of the Federal Property and Administrative Services Act of 1946, the defendants became and are liable to pay to the United States the sum of \$2,000 for each act committed by them that is determined by the court to be in violation of the said statute; or to pay to the United States as liquidated damages a sum equal to twice the consideration agreed to be given to the United States or federal agency involved. In this respect the United States elects to demand a sum equal to twice the consideration agreed to be given to the United States and federal agency involved.

### Count Two

#### I.

Plaintiff, United States of America, repeats and realleges as part of this cause of action each and all of the allegations contained in Paragraphs I, II, IV, V, VI, and VIII of its First Cause of Action and makes them a part hereof with like effect as if the same were set forth herein in full, and further alleges:

#### II.

The defendant, William W. Schwartze, is an individual and resides within the jurisdiction of this Court. [39]

### III.

The defendants, E. B. Hougham and William E. Schwartz, employed the following fraudulent tricks, schemes, and devices to obtain surplus property from the United States:

(1) During the year 1946, the defendants, E. B. Hougham and William E. Schwartz, induced, conspired, combined, and entered into agreements with one another to use the defendant William E. Schwartz's veteran's priority certificate to obtain surplus property for the defendant, E. B. Hougham, from the War Assets Administration, an agency of the United States.

(2) During the year 1946, the defendants, E. B. Hougham and William E. Schwartz, attended War Assets Administration sales for veterans only. The defendant, E. B. Hougham, selected and paid for the following trucks and trailers, which were purchased on the dates and for the amounts indicated through the use of the defendant William E. Schwartz's veteran's certificate for which service the defendant, E. B. Hougham, paid the defendant, William E. Schwartz:

|    | Date    | Item  | Amount      |
|----|---------|---|-------------|
| #1 | 9-16-46 | Truck, Oilfield, International, 2½-ton, No cab, Model M5H-6, Serial #29-942, Engine #30489, Tag #3961 | \$ 2,941.50 |
| #2 | 9-16-46 | Trailer, Bomb Carrier, 1-ton, Mod. 1, 1944, 4 Wheel w/bomb rack & Elec. brakes                        |             |

|                | Date       | Item   | Amount     |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
|----------------|------------|--|------------|------------|-----------|----------------|-----------|----------|----------------|----------|-----------|----------------|-----------|----------|----------------|---------|-----------|----------------|-----------|----------|--|
|                |            | <table><tr><th>Tag No.</th><th>Serial No.</th><th></th></tr><tr><td>(a) 1657</td><td>57187</td><td>\$120.10</td></tr><tr><td>(b) 1653</td><td>60542</td><td>120.10</td></tr><tr><td>(c) 1652</td><td>56757</td><td>120.10</td></tr><tr><td>(d) 1662</td><td>60548</td><td>120.10</td></tr><tr><td>(e) 1660</td><td>56980</td><td>120.10</td></tr></table>  | Tag No.    | Serial No. |           | (a) 1657       | 57187     | \$120.10 | (b) 1653       | 60542    | 120.10    | (c) 1652       | 56757     | 120.10   | (d) 1662       | 60548   | 120.10    | (e) 1660       | 56980     | 120.10   |  |
| Tag No.        | Serial No. |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (a) 1657       | 57187      | \$120.10   |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (b) 1653       | 60542      | 120.10   |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (c) 1652       | 56757      | 120.10   |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (d) 1662       | 60548      | 120.10   |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (e) 1660       | 56980      | 120.10   |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| #3             | 9-16-46    | Trailer, Bomb Carrier, Anthony or Highway Trailer, 1-ton, 1943, Model MK 11, w/bomb rack. Serial #70-573, Tag #2242  | 40.00      |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| #4             | 3- 4-46    | 1945 Freuhauf Low-bed Trailers:  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
|                |            | <table><tr><th>Serial No.</th><th></th></tr><tr><td>(a) 23929</td><td>2,220.87</td></tr><tr><td>(b) 23952</td><td>2,220.87</td></tr><tr><td>(c) 23932</td><td>2,220.87</td></tr><tr><td>(d) 18662</td><td>2,220.87</td></tr><tr><td>(e) 23927</td><td>2,220.87</td></tr></table>   | Serial No. |            | (a) 23929 | 2,220.87       | (b) 23952 | 2,220.87 | (c) 23932      | 2,220.87 | (d) 18662 | 2,220.87       | (e) 23927 | 2,220.87 |                |         |           |                |           |          |  |
| Serial No.     |            |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (a) 23929      | 2,220.87   |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (b) 23952      | 2,220.87   |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (c) 23932      | 2,220.87   |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (d) 18662      | 2,220.87   |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (e) 23927      | 2,220.87   |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| #5             | 3- 4-46    | 1942 Diamond T, 4-ton Truck:   |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
|                |            | <table><tr><th>Serial No.</th><th>Engine No.</th><th></th></tr><tr><td>(a) 968-A-0893</td><td>133095</td><td>3,350.00</td></tr><tr><td>(b) 968-A-1732</td><td>1200853</td><td>3,350.00</td></tr><tr><td>(c) 968-A-2422</td><td>1206863</td><td>3,350.00</td></tr><tr><td>(d) 968-A-2148</td><td>1203517</td><td>3,350.00</td></tr><tr><td>(e) 968-A-1446</td><td>134924</td><td>3,350.00</td></tr></table> | Serial No. | Engine No. |           | (a) 968-A-0893 | 133095    | 3,350.00 | (b) 968-A-1732 | 1200853  | 3,350.00  | (c) 968-A-2422 | 1206863   | 3,350.00 | (d) 968-A-2148 | 1203517 | 3,350.00  | (e) 968-A-1446 | 134924    | 3,350.00 |  |
| Serial No.     | Engine No. |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (a) 968-A-0893 | 133095     | 3,350.00   |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (b) 968-A-1732 | 1200853    | 3,350.00   |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (c) 968-A-2422 | 1206863    | 3,350.00   |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (d) 968-A-2148 | 1203517    | 3,350.00   |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (e) 968-A-1446 | 134924     | 3,350.00   |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| #6             | 3-22-46    | Freuhauf Military 4-ton Trailer:   |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
|                |            | <table><tr><th>Serial No.</th><th></th></tr><tr><td>(a) 79505</td><td>583.30</td></tr><tr><td>(b) 74447</td><td>583.30</td></tr><tr><td>(c) 79472</td><td>583.30</td></tr><tr><td>(d) 66762</td><td>583.30</td></tr><tr><td>(e) 66748</td><td>583.30</td></tr><tr><td>(f) 66715</td><td>583.30</td></tr><tr><td>(g) 98851</td><td>583.30</td></tr><tr><td>(h) 97005</td><td>583.30</td></tr></table>       | Serial No. |            | (a) 79505 | 583.30         | (b) 74447 | 583.30   | (c) 79472      | 583.30   | (d) 66762 | 583.30         | (e) 66748 | 583.30   | (f) 66715      | 583.30  | (g) 98851 | 583.30         | (h) 97005 | 583.30   |  |
| Serial No.     |            |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (a) 79505      | 583.30     |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (b) 74447      | 583.30     |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (c) 79472      | 583.30     |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (d) 66762      | 583.30     |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (e) 66748      | 583.30     |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (f) 66715      | 583.30     |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (g) 98851      | 583.30     |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |
| (h) 97005      | 583.30     |  |            |            |           |                |           |          |                |          |           |                |           |          |                |         |           |                |           |          |  |

|             | Date    | Item   | Amount      |
|-------------|---------|--|-------------|
| #7          | 6-26-46 | 1941 Dodge 1/2-ton Truck,<br>Serial #8685927, Engine<br>#7207-16682      | \$399.90    |
| #8          | 7- 1-46 | 1942 Chevrolet 1 1/2-ton<br>Truck, Serial #6NK07-7528,<br>Engine #456004 | 1,016.82    |
| #9          | 8- 1-46 | 1940 Dodge 1 1/2-ton Truck,<br>Serial #8642729, Engine<br>#T207-3442     | 315.85      |
| #10         | 9-30-46 | Truck 1/2-ton Dodge Weapon<br>Carrier, Engine #T215-<br>24851            | 295.81      |
| Total ..... |         |  | \$38,131.13 |

(3) The War Assets Administration sales as described herein were limited to World War II veterans for their personal use or use in their own enterprise. The defendant, E. B. Hougham, caused the defendant, Owen Dailey, to certify and represent to the War Assets Administration that the afore-said surplus property was being bought for the defendant Owen Dailey's personal use, or for use in Owen Dailey's own individual enterprise; and, further, to certify and represent a mailing address that in fact was fictitious; that Schwartz Truck Rental was situated at an address which was in fact fictitious; that Schwartz was operating an individual proprietorship; that such enterprise was already established; that Schwartz was or will be, directly or indirectly, the sole proprietor of the enterprise described in the certification; that no person or persons, other than veterans, have or will

have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof; that the [42] property was not procured for the purpose of resale; that the property is to be used in and as part of the enterprise described in the application, and that all of the statements were true to the best of Schwartze's knowledge and belief. That defendant Schwartze did so represent and certify to the United States.

(4) That the aforesaid certification and representations were false and were known by defendants Hougham and Schwartze to be false at the time said certifications and representations were made.

### Count Three

#### I.

Plaintiff, United States of America, repeats and realleges as part of this cause of action each and all of the allegations contained in paragraphs I, II, IV, V, VI, and VIII of its First Cause of Action and makes them a part hereof with like effect as if the same were set forth herein in full, and further alleges:

#### II.

The defendant, Harlan L. McFarland, is an individual and resides within the jurisdiction of this Court.

### III.

The defendants, E. B. Hougham and Harland L. McFarland, employed the following fraudulent tricks, schemes, and devices to obtain surplus property from the United States:

(1) During the year 1946, the defendants, E. B. Hougham and Harlan L. McFarland, induced, conspired, combined, and entered into agreements with one another to use the defendant Harland L. McFarland's veteran's priority certificate to obtain surplus property for the defendant, E. B. Hougham, from the War Assets Administration, an agency of the United States.

(2) During the year 1946, the defendants, E. B. Hougham and Harlan L. McFarland, attended War Assets Administration sales for veterans only. The defendant, E. B. Hougham, [43] selected and paid for the following trucks and trailers, which were purchased on the dates and for the amounts indicated through the use of the defendant Harlan L. McFarland's veteran's certificate for which service the defendant, E. B. Hougham, paid the defendant, Harland L. McFarland:

|    | Date   | Item  | Amount   |
|----|--------|---|----------|
| #1 | 7-2-46 | Trailer. Highway Trailer Co., 1943, bomb rack, 1-ton W.B. 56", 4 wheels, tires 600x9 4-ply, Model MK 11 |          |
|    |        | Tag No. Serial No.  |          |
|    | (a)    | 1881 70125  | \$125.60 |
|    | (b)    | 1882 70071  | 125.60   |
|    | (c)    | 1883 70069  | 125.60   |

## United States of America

| Date | Item    | Tag No.  | Serial No. | Amount   |
|------|---------|--|------------|----------|
|      |         | (d) 1884   | A1322313   | \$125.60 |
|      |         | (e) 1879   | A1323267   | 125.60   |
|      |         | (f) 1877   | A1323269   | 125.60   |
|      |         | (g) 1878   | A1323342   | 125.60   |
|      |         | (h) 1880   | 68562      | 125.60   |
|      |         | (i) 1887   | Unknown    | 125.60   |
|      |         | (j) 1888   | A1323082   | 125.60   |
|      |         | (k) 1885   | Unknown    | 125.60   |
|      |         | (l) 1886   | A1322315   | 125.60   |
| #2   | 7-2-46  | Trailer, Bomb Carrier, 1-ton<br>1944, Model 1, 4 Wheel,<br>w/bomb rack & electric<br>brakes:                   |            |          |
|      |         | Tag No.  | Serial No. |          |
|      |         | (a) 1646   | 56958      | 307.93   |
|      |         | (b) 1645   | 57703      | 307.93   |
|      |         | (c) 1647   | 60989      | 307.93   |
|      |         | (d) 1655   | 61352      | 307.93   |
|      |         | (e) 1654   | 60998      | 307.93   |
|      |         | (f) 1556   | 57945      | 307.93   |
| #3   | 9-16-46 | Trailer Tank, Rosman, 300<br>gallon water:   |            |          |
|      |         | Tag No.  | Serial No. |          |
|      |         | (a) 2356   | 5-95       | 179.38   |
|      |         | (b) 2357   | 5-69       | 179.38   |
|      |         | (c) 2358   | 5-67       | 179.38   |
| #4   | 9-16-46 | Trailer, Bomb Carrier, 1-ton,<br>Model 1, 1944, 4-Wheel,<br>w/bomb rack & electric<br>brakes:                  |            |          |
|      |         | Tag No.  | Serial No. |          |
|      |         | (a) 1620   | 57433      | 123.10   |
|      |         | (b) 1621   | 57274      | 123.10   |
| #5   | 9-16-46 | Truck, Oilfield, Interna-<br>tional, 2½-ton, no cab,<br>Model M5H6, Serial #33117,<br>Engine #34437, Tag #3983 |            |          |
|      |         |  |            | 3,015.04 |

|    | Date    | Item  | Amount   |
|----|---------|---|----------|
| #6 | 3-21-46 | (a) Truck, 1942 Chevrolet,<br>1½-ton, Serial #6NK21-<br>334, Motor #BV480054  | 1,312.86 |
|    |         | (b) Truck, 1943 Chevrolet,<br>1½-ton, Serial #9NK33-<br>3640, Motor #BV530844 | 1,476.96 |
| #7 | 4-8-46  | (a) Truck, 1941 Dodge,<br>½-ton, Serial #8660792,<br>Motor #T207-4712         | 615.00   |
|    |         | (b) Truck, 1942 Dodge,<br>¾-ton, Serial #81588893,<br>Motor #T214-58225       | 590.46   |
|    |         | (c) Truck, 1942 Dodge,<br>¾-ton, Serial #81579658,<br>Motor #T214-58716       | 533.11   |
|    |         | (d) Truck, 1942 Dodge,<br>¾-ton, Serial #81630672,<br>Motor #T214-99856       | 626.46   |
|    |         | (e) Truck, 1942 Dodge,<br>¾-ton, Serial #81620373,<br>Motor #T214-78615       | 608.01   |
|    |         | (f) Truck, 1942 Dodge,<br>¾-ton, Serial #81549669,<br>Motor #T214-34198       | 436.86   |
|    |         | (g) Truck, 1942 Dodge,<br>¾-ton, Serial #81624965,<br>Motor ?                 | 556.51   |
|    |         | (h) Truck, 1942 Dodge,<br>¾-ton, Serial #81576210,<br>Motor #T214-85001       | 527.51   |
|    |         | (i) Truck, 1942 Dodge,<br>¾-ton, Serial #81572194,<br>Motor #T214-39968       | 533.01   |
|    |         | (j) Truck, 1942 Dodge,<br>¾-ton, Serial #81545080,<br>Motor #T214-22709       | 527.46   |
|    |         | (k) Truck, 1942 Dodge,<br>¾-ton, Serial #81576402,<br>Motor #T. 4-50758       | 528.61   |

## United States of America

|     | Date    | Item   | Amount   |
|-----|---------|--|----------|
|     |         | (l) Truck, 1942 Dodge,<br>3/4-ton, Serial #81547808,<br>Motor #T214-29477        | \$537.66 |
|     |         | (m) Truck, 1942 Dodge,<br>3/4-ton, Serial #81621285,<br>Motor #T214-80454        | 540.51   |
|     |         | (n) Truck, 1942 Dodge,<br>3/4-ton, Serial #81574735,<br>Motor #T214-46597        | 466.66   |
|     |         | (o) Truck, 1942 Dodge,<br>3/4-ton, Serial #81548280,<br>Motor #T214-57727        | 485.11   |
|     |         | (p) Truck, 1942 Dodge,<br>3/4-ton, Serial #81549858,<br>Motor ?                  | 416.86   |
|     |         | (q) Truck, 1942 Dodge,<br>3/4-ton, Serial #81547648,<br>Motor #T214-29321        | 463.21   |
|     |         | (r) Truck, 1942 Dodge,<br>3/4-ton, Serial #81622743,<br>Motor #T214-82388        | 525.51   |
|     |         | (s) Truck, 1943 Dodge,<br>1/2-ton, Serial #81525152,<br>Eng. #T214-246558        | 565.53   |
|     |         | (t) Truck, 1941 Dodge,<br>1/2-ton, Serial #81507436,<br>Motor #T215-2194         | 527.85   |
| #8  | 5-9-46  | Truck, 1942 GMC; 2 1/2-ton,<br>Serial #70132-A2, Motor<br>#27091404              | 1,094.00 |
| #9  | 6-26-46 | Truck, 1942 GMC, 2 1/2-ton<br>Cargo, Serial #73290B1,<br>Motor 270107179         | 1,486.05 |
| #10 | 7-1-46  | (a) Truck, 1943 Dodge,<br>3/4-ton, Serial #81635955,<br>Motor #T214-111403       | 1,496.13 |
|     |         | (b) Truck, 1942 Chevrolet,<br>1 1/2-ton, Serial #9NED6-<br>5307, Motor #BV444884 | 1,124.70 |

|       | Date    | Item  | Amount      |
|-------|---------|---|-------------|
| #11   | 7-31-46 | Truck, 1942 Chevrolet, 1½-ton, Serial #14NK20-1270  | 1,064.93    |
| #12   | 8-1-46  | Truck, 1942 Dodge, ¾-ton, Serial #81549056, Motor ? | 888.62      |
| Total |         |   | \$27,710.51 |

(3) The War Assets Administration sales were limited to World War II veterans holding certificates to purchase for their personal use or in their own enterprise. The defendant, E. B. Hougham, caused the defendant, Harlan L. McFarland, to certify and represent to the War Assets Administration that the aforesaid surplus property was being bought for the defendant Harlan L. McFarland's own personal use, or for use in Owen Dailey's own individual enterprise; and further to certify and represent a mailing address which was in fact fictitious; that McFarland was operating an enterprise at an address which was in fact fictitious; that McFarland was operating an individual proprietorship; that such enterprise was already established; that McFarland was or will be directly or indirectly the sole proprietor of the enterprise described in the certification; that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof; that the property was not procured for purpose of resale; that the property is to be used in and as part of the

enterprise described in the application, and that all of the statements were true to the best of McFarland's knowledge and belief. That defendant McFarland did so represent and certify to the United States.

(4) That the aforesaid certification and representations [48] were false and were known by defendants Hougham and McFarland to be false at the time said certifications and representations were made.

Wherefore, the plaintiff demands judgment against the defendants as follows:

1. Against the defendant, Owen Dailey, on the First Count, to pay to the United States as liquidated damages a sum equal to twice the consideration agreed to be given to the United States or federal agency involved.
2. Against the defendant William E. Schwartze on the Second Count to pay to the United States as liquidated damages a sum equal to twice the consideration agreed to be given to the United States or federal agency involved.
3. Against the defendant, Harlan L. McFarland, on the Third Count, to pay to the United States as liquidated damages a sum equal to twice the consideration agreed to be given to the United States or federal agency involved.
4. Against the defendant, E. B. Hougham, individually and doing business as Bakers Motor Market

on all Three Counts, to pay to the United States as liquidated damages a sum equal to twice the consideration agreed to be given to the United States or federal agency involved.

5. For costs of suit incurred herein.

6. For such other relief as to the court may seem just and equitable.

LAUGHLIN E. WATERS,  
United States Attorney;

MAX F. DEUTZ,  
Asst. U. S. Attorney, Chief of  
Civil Division;

RICHARD A. LAVINE,  
Asst. U. S. Attorney;

/s/ RICHARD A. LAVINE,  
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]. Filed November 2, 1956. [49]

[Title of District Court and Cause.]

**MEMORANDUM AND ORDERS ON DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT, AND ORDER ON PLAINTIFF'S MOTION TO FILE A SECOND AMENDED COMPLAINT,**

On December 31, 1954, plaintiff filed its original complaint seeking judgment against the defendants

for damages for fraudulent purchases of government property. The complaint was instituted under the provisions of Section 26(b) of the Surplus Property Act of 1944, 50 U.S.C. App. 1635(b), repealed and re-enacted as Section 209(b) of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 239(b) and renumbered as 40 U.S.C. 489(b).

The defendants moved to dismiss the action on the ground that the Court lacked jurisdiction over the subject matter; that the complaint failed to state a claim upon which relief could be granted, and that the action was not brought within the statutory period. [51]

Under date of September 7, 1955, I denied the motion of the defendants to dismiss the action. In that order I held that the Court had jurisdiction over the subject matter of the action by virtue of the provisions of Section 26(c) of the Surplus Property Act of 1944, repealed and re-enacted as Section 209(c) of the Federal Property and Administrative Services Act of 1949, and that the complaint clearly alleged a violation of the Surplus Property Act. In respect to that ground of the motion to dismiss based upon the contention that the action was not brought within the statutory period I held that Section 2462 of Title 28 U.S.C.A. was applicable, and that the suit could not be entertained unless commenced within five years from the date when the claim first accrued. I further stated that the war time suspension of limitations statute, 18, U.S.C.A.,

Section 3287, was applicable, and inasmuch as the complaint was filed December 31, 1954, the action was not barred by Section 2462 of Title 28, U.S.C.A.

In reaching the conclusion that said section was applicable to the instant case I relied on the views expressed in *United States v. Witherspoon*, 211 Fed. 2d 858 (Sixth Circuit). The *Witherspoon* case held that an action under Section 26(b) of the Surplus Property Act, 50 U.S.C.A. App. 1635(b), repealed and re-enacted as Section 209(b) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C.A. 489(b), was an action for a "penalty," within the meaning of Section 2462 of Title 28 U.S.C.A.

The Circuit Court of Appeals of the Fifth Circuit, in *United States v. Weaver*, 207 Fed. 2d 796, reached a contrary conclusion and held that an action of the character here involved was a civil action to recover an award of damages of a compensatory nature, payable to the United States for injury to its property rights, and was not a civil action for a [52] penalty. Later the United States Court of Appeals for the Seventh Circuit, in the case of *United States v. Rex Trailer Company*, held that Section 26(b) of the Surplus Property Act of 1944 was not penal in nature. The Supreme Court granted certiorari in that case (349 U. S. 937). In its opinion (350 U. S. 148) the Supreme Court stated that it granted the petition for a writ of certiorari "to resolve an asserted conflict between the decisions of the Circuit Courts of Appeals. In considering

whether the statute of limitations contained in Title 28 U.S.C.A. 2462 applied to Section 26(b)(1) of the Surplus Property Act, the Fifth Circuit held Section 26(b)(1) to be a civil remedy in *United States v. Weaver*, 207 Fed. 2d 796, 797, and the Sixth Circuit held it to be penal in *United States v. Witherspoon*, 211 Fed. 2d 858."

In the *Rex Trailer Company* case the petitioner contended that the action brought by the Government to recover \$2,000.00 on each of five counts of the complaint based on Section 26(b)(1) of the Surplus Property Act of 1944, placed it twice in jeopardy in violation of the Fifth Amendment. In an earlier proceeding the petitioner had pleaded *nolo contendere* to a five-count indictment based on the same five transactions, and had paid fines in the aggregate amount of \$25,000.00. The Supreme Court affirmed the Circuit Court of Appeals, and the District Court, and held that the recovery under Section 26(b)(1) is civil in nature and did not put the petitioner twice in jeopardy in violation of the Fifth Amendment.

While the statute of limitations was not involved in the *Rex Trailer Company* case, the character of Section 26(b)(1) of the Surplus Property Act of 1944 was involved. At page 151 of the opinion, the Court stated:

"We conclude that the recovery here is civil in nature. The Government has the right to make contracts and hold and dispose of prop-

erty, and, for the protection of its property rights, it may resort to the same remedies as a private [53] person. *Cotton v. United States*, 11 How. 229. Liquidated damages are a well-known remedy, and in fact Congress has utilized this form of recovery in numerous situations. In all building contracts, for instance, Congress has required the insertion of a liquidated damage clause which 'shall be conclusive and binding upon all parties' without proof of 'actual or specific damages sustained \* \* \*.' 32 Stat. 326, 40 U.S.C., Section 269. Liquidated damage provisions, when reasonable, are not to be regarded as penalties, *United States v. United Engineering and Construction Co.*, 234 U. S. 236, 241, and are therefore civil in nature."

In view of this decision I feel constrained to confess that I was in error in my order of September 7, 1955, holding that Section 2462 of Title 28, U.S.C.A., was the applicable statute of limitations in the instant case. No statute of limitations appears in the Surplus Property Act of 1944. None appears in Section 489 of Title 40, U.S.C.A. Section 28 of the Surplus Property Act of 1944 simply provides that the running of any existing statute of limitations applicable to the handling and disposal of surplus property shall be suspended until three years after the termination of hostilities. If none exists, of course, these sections are inapplicable. I now hold that there is no statute of limitations applicable in the instant case and that my order of September 7, 1955, must be modified accordingly.

On October 9, 1956, the defendants filed a motion for an order of this Court dismissing the action, and for a summary judgment. On November 2, 1956, the plaintiff filed its motion for an order permitting the filing of the first amended complaint. All of the above orders came on for hearing before the Court on November 13, 1956. Laughlin E. Waters, United States Attorney; Max F. Deutz, Assistant United States Attorney, and Richard A. Lavine, Assistant United States Attorney, appearing, represented the plaintiff, and Conron, Heard and James, Calvin H. Conlon appearing, represented the defendants. Following oral argument and the filing of written briefs, these [54] motions were submitted to the Court for its decision on November 24, 1956.

Prior to the ruling on these motions, and on December 21, 1956, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, plaintiff moved for an order permitting the filing of a second amended complaint upon the ground that the second amended complaint was made to conform to the proof that the plaintiff intends to submit at the trial in support of its claim for relief, and in that motion plaintiff withdrew the proposed first amended complaint. This motion came on for hearing before the Court on January 14, 1957. Laughlin E. Waters, United States Attorney; Max F. Deutz, Assistant United States Attorney, and Richard A. Lavine, Assistant United States Attorney, appearing, represented the plaintiff, and Conron, Heard and James, Calvin H. Conlon appearing, represented

the defendants. Following oral argument, all motions were submitted to the Court for its decision.

Defendant's motions to dismiss the original complaint and for summary judgment are based largely upon matters developed as the result of discovery proceedings. I held in my order of September 7, 1955, that the original complaint alleged sufficient facts upon which relief might be granted. The original complaint and the answer thereto raised issues of fact. The motions are premature and could be determined only after the plaintiff had offered its proof and rested. The motions to dismiss and for summary judgment are, and each of them is, therefore denied.

The remaining motion to be considered is the motion of the plaintiff for an order permitting the filing of the second amended complaint.

The defendants oppose the granting of this motion on two grounds, which will be mentioned later.

In the original complaint the false and fraudulent representations relied upon were the alleged representations in each [55] cause of action that the veteran involved in each cause of action respectively certified and represented that the surplus property procured from the Government under each cause of action was being purchased by the veteran for his own personal use, whereas it is alleged that said property was being purchased by the veteran for the defendant, E. B. Hougham. The original complaint further alleged that pursuant to the provi-

sions of Section 26(b) of the Surplus Property Act of 1944, repealed and re-enacted as Section 209(h) of the Federal Property and Administrative Services Act of 1949; the defendants became liable to the United States the sum of \$2,000.00 for each act committed by them in violation of law, and double the amount of the undetermined damages which the United States has sustained by reason thereof.

The offered second amended complaint seeks judgment against the defendants as liquidated damages the sum of \$2,000.00 for each act that is determined by the Court to be in violation of Section 26(b) of the Surplus Property Act of 1944. It seeks recovery of the damages under the same provisions of law which were set forth in the original complaint. The items of property set forth in paragraph 7 are the same in both complaints, except a truck purchased on November 26, 1946, alleged in the original complaint is not included in the second amended complaint. In paragraph seven of the original complaint, (subdivision 3) it is alleged that the defendant, E. B. Hougham, caused the defendant, Owen Dailey, to certify and represent to the War Assets Administration that the surplus property was being bought for the defendant Dailey's personal use, and in subdivision 4 of paragraph 7 it is alleged that such certification and representations were false, since in fact the said property was being purchased by the defendant, Owen Dailey, for the defendant, E. B. Hougham, and not for the de-

fendant Owen [56] Dailey's personal use. In subdivision 3 of paragraph 7 of the second amended complaint it is alleged that the defendant, E. B. Hougham, caused the defendant, Owen Dailey, to certify and represent to the War Assets Administration that the surplus property was being bought for the defendant Owen Dailey's use in Owen Dailey's own personal individual enterprise, and then follows a series of alleged representations made to the War Assets Administration. Subdivision 4 of paragraph 7 of the second amended complaint alleges that the representations set forth in subdivision 3 were false and known by the defendants, Hougham and Dailey, to be false at the time they were made.

Changes similar to those appearing in Count 1 of the second amended complaint appear in Counts 2 and 3 thereof, except that in Count 2 it is alleged that the defendant, E. B. Hougham, caused the defendant, William E. Schwartz, to certify and represent to the War Assets Administration that the surplus property described in said count was being bought for the defendant William E. Schwartz's personal use or for use in William E. Schwartz's own individual enterprise. Counts 4 and 5 of the original complaint are omitted from the second amended complaint.

Defendants oppose the motion for an order to file the second amended complaint on two grounds. First, that the causes of action set forth in the sec-

ond amended complaint are barred by the statute of limitations set forth in Section 2462 of Title 28, U.S.C.A., in that said causes of action are separate and distinct causes of action from those set forth in the original complaint and hence do not "relate back" to the date of the filing of the original complaint. In view of the conclusion that I have heretofore reached, that no statute of limitation is applicable to the acts set forth no discussion is necessary as to whether or not the second amended complaint sets forth [57] new and distinct causes of action or "relates back" to the filing of the original complaint.

The second ground is that the second amended complaint fails to state a claim upon which relief might be granted.

The Congress declared that the objectives of the Surplus Property Act of 1944 were to facilitate and regulate the orderly disposal of surplus property. Among other things, the Act was expressly designed to facilitate the transition of individuals from wartime to peacetime employment, to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business and professional enterprises, and to assure the sale of surplus property in such quantities and on such terms as would discourage disposal to speculators or for speculative purposes. The disposal program of the War Assets Administration included sales of surplus property at which the only eligible purchasers were veterans of World War II. The sur-

plus property described in the second amended complaint, according to the allegations of the complaint, was purchased at sales which were limited to World War II veterans for their personal use or for use in their own enterprises. In order to be certified as an eligible purchaser at the sales described in the second amended complaint, and as a condition precedent to the same, a veteran was required to certify and represent that the intended use of the surplus property was for specified restricted purposes, and in certain instances, that he had the required occupational qualifications.

Paragraph 7 of the second amended complaint alleges the alleged fraudulent representations made by the defendants to obtain the surplus property described in the complaint. Defendants contend that the determination by the War Assets Administration, that the veterans in question were qualified to make the purchases at the restricted sales, was a final and [58] conclusive determination. I do not share that view. If the representations made to the War Assets Administration, in order to obtain priority certificates, were false, as alleged in the second amended complaint, such allegations, in my opinion, constitute a claim upon which relief might be granted. The pertinent regulations adopted by the Administrator were consonant with the purposes of the Act of 1944.

Defendants contend that since the government received the price fixed by it on the surplus property

purchased at such restricted sales, the government has not been injured or damaged, and therefore is not entitled to recover. In the *Rex Trailer Company* case, *supra*, at page 153, appears the following pertinent language:

"It is obvious that injury to the Government resulted from the *Rex Trailer Company's* fraudulent purchase of trucks. It precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation. The damages resulting from this injury may be difficult or impossible to ascertain, but it is the function of liquidated damages to provide a measure of recovery in such circumstances."

In *Rohleder v. United States*, 157 Fed. 2d 126, it was held that proof of damages is not a condition of recovery under the False Claims Act, 31 U.S.C., Section 231.

From my study of the record in this case it is my view that the second amended complaint states a claim upon which relief might be granted.

The motion of the plaintiff to file the second amended complaint and to withdraw the proposed first amended complaint is granted. The defendants are granted twenty days from the date hereof in which to file their answer.

The Clerk of this Court is directed to forthwith

mail copies of this memorandum to counsel for all parties. [59]

GILBERT H. JERTBERG,  
Judge, United States District  
Court.

Dated: January 18, 1957.

I hereby certify that the foregoing is a full and true copy of "Memorandum and Orders, etc.," as furnished by the U. S. Attorney's Office, inasmuch the original of this document has been misplaced or lost.

JOHN A. CHILDRESS,  
Clerk, U. S. District Court, Southern District of  
California;

[Seal] By /s/ WM. A. WHITE,  
Deputy.

[Endorsed]: Filed January 18, 1957. [60]

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT FOR DAM-  
AGES FOR FRAUDULENT PURCHASE  
OF GOVERNMENT PROPERTY  
(40 U.S.C.A. 489(b))

Plaintiff, United States of America, complains of the above-named defendants and for cause of action alleges as follows in this second amended complaint:

## Count One

## I.

This is a civil action brought by the United States of America, as plaintiff, under the provisions of Section 26(b) of the Surplus Property Act of 1944, 50 U.S.C. App. 1635(b), repealed and re-enacted as Section 209(b) of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 239(b), and renumbered as 40 U.S.C. 489(b) of which this Court has jurisdiction by virtue of the provisions of Section 26(c), of the Surplus Property Act of 1944, repealed and re-enacted as Section 209(c) of the Federal Property and [61] Administrative Services Act of 1949.

## II.

The defendant, E. B. Hougham, is an individual and resides within the jurisdiction of this Court. At all times herein mentioned, said defendant was doing business under the fictitious firm name of Bakers Motor Market and within the jurisdiction of this Court.

## III.

The defendant, Owen Dailey, is an individual and resides within the jurisdiction of this Court.

## IV.

The Congress of the United States enacted the Surplus Property Act of 1944 in order to facilitate and regulate the orderly disposal of Government surplus property. Among other things, the Act was expressly designed to afford returning veterans an

opportunity to establish themselves as proprietors of agricultural, business, and professional enterprises. Pursuant to this Act, the War Assets Administration, an agency of the United States, was duly authorized and directed to dispose of Government surplus property. The disposal program of the War Assets Administration included the sales at which the only eligible purchasers were veterans of World War II. In order to be certified as an eligible purchaser and as a condition precedent to the same, a veteran had to certify and represent that the intended use of the surplus property was for specified restricted purposes, and, in certain instances, that he had the required occupational qualifications.

#### V.

During 1946, the defendants did use or engage in or caused to be used or engaged in certain fraudulent tricks, schemes and devices, described hereinafter, for the purpose of securing or obtaining or aiding to secure or obtain [62] Government property from the United States and/or the War Assets Administration in connection with the procurement, transfer, or disposition of property under the Surplus Property Act of 1944.

#### VI.

During 1946, the defendants did agree, combine, and conspire to use or engage in or cause to be used or engaged in certain fraudulent tricks, schemes, and devices, described hereinafter, for the purpose of securing or obtaining or aiding to secure

or obtain Government property from the United States and/or the War Assets Administration in connection with the procurement, transfer or disposition of property under the Surplus Property Act of 1944.

## VII.

The defendants, E. B. Hougham and Owen Dailey, employed the following fraudulent tricks, schemes, and devices to obtain surplus property from the United States:

(1) During the year 1946, the defendants, E. B. Hougham and Owen Dailey, induced, conspired, combined, and entered into agreements with one another to use the defendant Owen Dailey's veteran's priority certificate to obtain surplus property for the defendant, E. B. Hougham, from the War Assets Administration, an agency of the United States.

(2) During the year 1946, the defendants, E. B. Hougham and Owen Dailey, attended War Assets Administration sales for veterans only. The defendant, E. B. Hougham, selected and paid for the following trucks, and trailers, which were purchased on the dates and for the amounts indicated through the use of the defendant Owen Dailey's veteran's certificate for which service the defendant, E. B. Hougham, paid the defendant, Owen Dailey: [63]

|    | Date    | Item   | Amount      |
|----|---------|--|-------------|
| #1 | 9-16-46 | Truck, Cargo, Ford, 1943,<br>1½-ton, Drive 4x4, W.B.<br>115", Model GTB, Serial &<br>Engine #199809, Tag<br>#5235. | \$ 1,059.85 |

|    | Date    | Item  | Amount   |
|----|---------|---|----------|
| #2 | 9-16-46 | Trailer, Full 4-Wheel bomb carrier, chassis 158"x34", 1944 Model MK 111, 1-ton, Various mfgs. Ser. No. 60550, Tag #1702 | \$123.10 |

| #3       | 9-17-46    | Trailer, tank, water, capacity 300 gal., by Rossman:  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
|----------|------------|---|---------|------------|--|----------|-------|--------|----------|-------|--------|----------|-------|--------|----------|-------|--------|----------|-------|--------|----------|-------|--------|----------|-------|--------|----------|-------|--------|----------|-------|--------|----------|-------|--------|----------|-------|--------|----------|-------|--------|----------|-------|--------|----------|-------|--------|--|
|          |            | <table border="1"> <thead> <tr> <th>Tag No.</th> <th>Serial No.</th> <th></th> </tr> </thead> <tbody> <tr><td>(a) 4244</td><td>7-469</td><td>175.00</td></tr> <tr><td>(b) 4243</td><td>7-481</td><td>175.00</td></tr> <tr><td>(c) 4228</td><td>7-797</td><td>175.00</td></tr> <tr><td>(d) 4241</td><td>7-392</td><td>175.00</td></tr> <tr><td>(e) 4245</td><td>7-718</td><td>175.00</td></tr> <tr><td>(f) 4247</td><td>7-466</td><td>175.00</td></tr> <tr><td>(g) 4246</td><td>7-509</td><td>175.00</td></tr> <tr><td>(h) 4226</td><td>7-713</td><td>175.00</td></tr> <tr><td>(i) 4230</td><td>7-482</td><td>175.00</td></tr> <tr><td>(j) 4229</td><td>7-484</td><td>175.00</td></tr> <tr><td>(k) 4227</td><td>7-724</td><td>175.00</td></tr> <tr><td>(l) 4224</td><td>7-559</td><td>175.00</td></tr> <tr><td>(m) 4223</td><td>7-704</td><td>175.00</td></tr> <tr><td>(n) 4222</td><td>7-763</td><td>175.00</td></tr> </tbody> </table> | Tag No. | Serial No. |  | (a) 4244 | 7-469 | 175.00 | (b) 4243 | 7-481 | 175.00 | (c) 4228 | 7-797 | 175.00 | (d) 4241 | 7-392 | 175.00 | (e) 4245 | 7-718 | 175.00 | (f) 4247 | 7-466 | 175.00 | (g) 4246 | 7-509 | 175.00 | (h) 4226 | 7-713 | 175.00 | (i) 4230 | 7-482 | 175.00 | (j) 4229 | 7-484 | 175.00 | (k) 4227 | 7-724 | 175.00 | (l) 4224 | 7-559 | 175.00 | (m) 4223 | 7-704 | 175.00 | (n) 4222 | 7-763 | 175.00 |  |
| Tag No.  | Serial No. |   |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
| (a) 4244 | 7-469      | 175.00  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
| (b) 4243 | 7-481      | 175.00  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
| (c) 4228 | 7-797      | 175.00  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
| (d) 4241 | 7-392      | 175.00  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
| (e) 4245 | 7-718      | 175.00  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
| (f) 4247 | 7-466      | 175.00  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
| (g) 4246 | 7-509      | 175.00  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
| (h) 4226 | 7-713      | 175.00  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
| (i) 4230 | 7-482      | 175.00  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
| (j) 4229 | 7-484      | 175.00  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
| (k) 4227 | 7-724      | 175.00  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
| (l) 4224 | 7-559      | 175.00  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
| (m) 4223 | 7-704      | 175.00  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |
| (n) 4222 | 7-763      | 175.00  |         |            |  |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |          |       |        |  |

| #4       | 9-17-46    | Trailer, bomb carrier, Anthony or Highway Trailer, 1-ton, 1943 Model MK 11, w/bomb rack:  |         |            |  |          |       |       |          |          |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |  |
|----------|------------|---|---------|------------|--|----------|-------|-------|----------|----------|-------|----------|-------|-------|----------|-------|-------|----------|-------|-------|----------|-------|-------|----------|-------|-------|----------|-------|-------|----------|-------|-------|--|
|          |            | <table border="1"> <thead> <tr> <th>Tag No.</th> <th>Serial No.</th> <th></th> </tr> </thead> <tbody> <tr><td>(a) 2240</td><td>68593</td><td>40.00</td></tr> <tr><td>(b) 2237</td><td>A1318373</td><td>40.00</td></tr> <tr><td>(c) 2339</td><td>70215</td><td>40.00</td></tr> <tr><td>(d) 2230</td><td>72055</td><td>40.00</td></tr> <tr><td>(e) 2229</td><td>72975</td><td>40.00</td></tr> <tr><td>(f) 2226</td><td>71605</td><td>40.00</td></tr> <tr><td>(g) 2225</td><td>71670</td><td>40.00</td></tr> <tr><td>(h) 2228</td><td>72982</td><td>40.00</td></tr> <tr><td>(i) 2227</td><td>72764</td><td>40.00</td></tr> </tbody> </table> | Tag No. | Serial No. |  | (a) 2240 | 68593 | 40.00 | (b) 2237 | A1318373 | 40.00 | (c) 2339 | 70215 | 40.00 | (d) 2230 | 72055 | 40.00 | (e) 2229 | 72975 | 40.00 | (f) 2226 | 71605 | 40.00 | (g) 2225 | 71670 | 40.00 | (h) 2228 | 72982 | 40.00 | (i) 2227 | 72764 | 40.00 |  |
| Tag No.  | Serial No. |   |         |            |  |          |       |       |          |          |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |  |
| (a) 2240 | 68593      | 40.00   |         |            |  |          |       |       |          |          |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |  |
| (b) 2237 | A1318373   | 40.00   |         |            |  |          |       |       |          |          |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |  |
| (c) 2339 | 70215      | 40.00   |         |            |  |          |       |       |          |          |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |  |
| (d) 2230 | 72055      | 40.00   |         |            |  |          |       |       |          |          |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |  |
| (e) 2229 | 72975      | 40.00   |         |            |  |          |       |       |          |          |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |  |
| (f) 2226 | 71605      | 40.00   |         |            |  |          |       |       |          |          |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |  |
| (g) 2225 | 71670      | 40.00   |         |            |  |          |       |       |          |          |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |  |
| (h) 2228 | 72982      | 40.00   |         |            |  |          |       |       |          |          |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |  |
| (i) 2227 | 72764      | 40.00   |         |            |  |          |       |       |          |          |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |          |       |       |  |

## United States of America

| Date | Item  | Amount   |
|------|---|----------|
|      | Motor #T214-78615   | \$608.01 |
|      | (f) Truck, 1942 Dodge,<br>3/4-ton, Serial #81549669,<br>Motor #T214-34198 | 436.86   |
|      | (g) Truck, 1942 Dodge;<br>3/4-ton, Serial #81624965,<br>Motor, ?          | 556.51   |
|      | (h) Truck, 1942 Dodge,<br>3/4-ton, Serial #81576210,<br>Motor #T214-85001 | 527.51   |
|      | (i) Truck, 1942 Dodge,<br>3/4-ton, Serial #81572194,<br>Motor #T214-39968 | 533.01   |
|      | (j) Truck, 1942 Dodge,<br>3/4-ton, Serial #81545080,<br>Motor #T214-22709 | 527.46   |
|      | (k) Truck, 1942 Dodge,<br>3/4-ton, Serial #81576402,<br>Motor #T214-50758 | 528.81   |
|      | (l) Truck, 1942 Dodge,<br>3/4-ton, Serial #81547808,<br>Motor #T214-29477 | 537.66   |
|      | (m) Truck, 1942 Dodge,<br>3/4-ton, Serial #81621285,<br>Motor #T214-80454 | 540.51   |
|      | (n) Truck, 1942 Dodge,<br>3/4-ton, Serial #81574735,<br>Motor #T214-46597 | 466.66   |
|      | (o) Truck, 1942 Dodge,<br>3/4-ton, Serial #81548280,<br>Motor #T214-57727 | 485.11   |
|      | (p) Truck, 1942 Dodge,<br>3/4-ton, Serial #81549858,<br>Motor ?           | 416.86   |
|      | (q) Truck, 1942 Dodge,<br>3/4-ton, Serial #81547648,<br>Motor #T214-29321 | 463.21   |
|      | (r) Truck, 1942 Dodge,<br>3/4-ton, Serial #81622743<br>Motor #T214-82388  | 525.51   |

|             | Date    | Item   | Amount               |
|-------------|---------|--|----------------------|
|             |         | (s) Truck, 1943 Dodge,<br>1/2-ton, Serial #81525152,<br>Eng. #T214-246558  | \$565.53             |
|             |         | (t) Truck, 1941 Dodge,<br>1/2-ton, Serial #81507436;<br>Motor #T215-2194   | 527.85               |
| #8          | 5- 9-46 | Truck, 1942 GMC, 2 1/2-ton,<br>Serial #70132-A2, Motor<br>#27091404  | 1,094.00             |
| #9          | 6-26-46 | Truck, 1942 GMC, 2 1/2-ton<br>Cargo, Serial #73290B1,<br>Motor 270107179   | 1,486.05             |
| #10         | 7- 1-46 | (a) Truck, 1943 Dodge,<br>3/4-ton, Serial #81635955,<br>Motor #T214-111403<br>(b) Truck, 1942 Chevrolet,<br>1 1/2-ton, Serial #9NED6-<br>5307, Motor #BV444884 | 1,496.13<br>1,124.70 |
| #11         | 7-31-46 | Truck, 1942 Chevrolet, 1 1/2-<br>ton, Serial #14NK20-1270  | 1,064.93             |
| #12         | 8- 1-46 | Truck, 1942 Dodge, 3/4-ton,<br>Serial #81549056, Motor ?   | 888.62               |
| Total ..... |         |  | \$27,710.51          |

(3) The War Assets Administration sales were limited to World War II veterans holding certificates to purchase for their personal use or in their own enterprise. The defendant E. B. Hougham, caused the defendant Harlan L. McFarland to certify and represent to the War Assets Administration that the aforesaid surplus property was being bought for use in Harlan L. McFarland's own individual enterprise; and further to certify and rep-

## United States of America

|    | Date    | Item                                      | Amount |
|----|---------|---|--------|
| #5 | 9-17-46 | Trailer, Tank 300-gal. water,<br>Rossman: |        |

|     | Tag No. | Serial No. | Amount   |
|-----|---------|------------|----------|
| (a) | 2352    | 5-12       | \$175.00 |
| (b) | 2354    | 5-16       | 175.00   |
| (c) | 2351    | 5-18       | 175.00   |
| (d) | 2350    | 5-22       | 175.00   |
| (e) | 2349    | 5-15       | 175.00   |
| (f) | 2347    | 5-24       | 175.00   |
| (g) | 2362    | 5-74       | 175.00   |
| (h) | 2361    | 5-71       | 175.00   |
| (i) | 2360    | 5-77       | 175.00   |
| (j) | 2363    | 5-78       | 175.00   |
| (k) | 2364    | 5-70       | 175.00   |

|    |         |   |  |
|----|---------|---|--|
| #6 | 9-17-46 | Trailer: By Spem 1944,<br>Cargo, 1-ton, steel parking<br>wheel, single axle, wood<br>body with racks, no serial<br>numbers: |  |
|----|---------|---|--|

|     | Tag No. | Amount |
|-----|---------|--------|
| (a) | 4666    | 97.00  |
| (b) | 4664    | 97.00  |
| (c) | 4661    | 97.00  |
| (d) | 4663    | 97.00  |
| (e) | 4662    | 97.00  |
| (f) | 4642    | 97.00  |
| (g) | 4634    | 97.00  |
| (h) | 4618    | 97.00  |
| (i) | 4653    | 97.00  |
| (j) | 4655    | 97.00  |
| (k) | 4656    | 97.00  |
| (l) | 4600    | 97.00  |
| (m) | 4602    | 97.00  |
| (n) | 4640    | 97.00  |
| (o) | 4641    | 97.00  |
| (p) | 4625    | 97.00  |
| (q) | 4643    | 97.00  |
| (r) | 4629    | 97.00  |
| (s) | 4631    | 97.00  |
| (t) | 4680    | 97.00  |

|       | Date    | Tag No.  | Item  | Amount      |
|-------|---------|----------|---|-------------|
|       |         | (u) 4688 |   | \$97.00     |
|       |         | (v) 4689 |   | 97.00       |
|       |         | (w) 4682 |   | 97.00       |
|       |         | (x) 4668 |   | 97.00       |
| #7    | 7-31-46 |          | Truck, 1942 1½-ton Chevrolet. Serial #6NK07-7509, Motor #BV468230.        | 1,084.57    |
| #8    | 8- 1-46 |          | Truck, 1942 ¾-ton Dodge, Serial #8154754, Motor #T214-28417.              | 899.29      |
| #9    | 8- 5-46 |          | Truck, 1941 ½-ton Dodge Ambulance, Serial #8652-882, Motor #T207-10213.   | 917.60      |
| #10   | 9-25-46 |          | Jeep, 1942 Ford, Serial #7226, Motor #MB183656.                           | 498.45      |
| #11   | 9-30-46 |          | Truck, 1940 Dodge, ½ Weapon Carrier, Serial #8642955, Motor #T202-2874.   | 333.23      |
| #12   | 9-30-46 |          | Truck, 1942 Dodge, ¾-ton Ambulance, Serial #8155-5692, Motor #T214-22034. | 834.65      |
| #13   | 9-30-46 |          | Truck, 1943 Dodge, ¾-ton Recon., Serial #81575481, Motor #T214-46311.     | 694.08      |
| #14   | 9-30-46 |          | Truck, 1940 Dodge, ½-ton Pickup, Serial #8641482, Motor #T202-108300.     | 163.19      |
| Total |         |          |   | \$13,671.62 |

(3) The War Assets Administration sales as described herein were limited to World War II veterans for their personal use or use in their own enterprise. The defendant, E. B. Hougham, caused the defendant, Owen Dailey, to certify and represent

to the War Assets Administration that the aforesaid surplus property was being bought for use in Dailey's own individual enterprise; and further to certify and represent that such an enterprise was at that time established, that Dailey was at that time operating it; that Dailey was the only person financially interested in the enterprise; that the funds for the enterprise were being put up by Dailey; that Dailey was not purchasing the property described for the benefit of any other enterprise, dealer, broker, merchant, or other undisclosed partner or principal; that the enterprise was one in which more than 50% of the invested capital or net income thereof was owned by or accrued to Dailey, and that all the statements made in the [67] application were true and complete to the best of the knowledge and belief of Dailey. That defendant Dailey did so represent and certify to the United States.

(4) That the aforesaid certification and representations were false and were known by defendants Hougham and Dailey to be false at the time said certification and representations were made.

### VIII.

By reason of the premises and pursuant to the provisions of Section 26(b) of the Surplus Property Act of 1944, repealed and re-enacted as Section 209(b) of the Federal Property and Administrative Services Act of 1946, the defendants became and are liable to pay to the United States the sum of

\$2,000 for each act committed by them that is determined by the court to be in violation of the said statute.

Count Two

I.

Plaintiff, United States of America, repeats and realleges as part of this cause of action each and all of the allegations contained in Paragraphs I, II, IV, V, VI, and VIII of its First Cause of Action and makes them a part hereof with like effect as if the same were set forth herein in full, and further alleges:

II.

The defendant, William E. Schwartz, is an individual and resides within the jurisdiction of this Court.

III.

The defendants, E. B. Hougham and William E. Schwartz, employed the following fraudulent tricks, schemes, and devices to obtain surplus property from the United States:

(1) During the year 1946, the defendants, E. B. Hougham and William E. Schwartz, induced, conspired, combined, and [68] entered into agreements with one another to use the defendant William E. Schwartz's veteran's priority certificate to obtain surplus property for the defendant, E. B. Hougham, from the War Assets Administration, an agency of the United States.

(2) During the year 1946, the defendants, E. B. Hougham and William E. Schwartz, attended War Assets Administration sales for veterans only. The defendant, E. B. Hougham, selected and paid for the following trucks and trailers, which were purchased on the dates and for the amounts indicated through the use of the defendant William E. Schwartz's veteran's certificate for which service the defendant, E. B. Hougham, paid the defendant, William E. Schwartz:

|    | Date    | Item   | Amount      |
|----|---------|--|-------------|
| #1 | 9-16-46 | Truck, Oilfield, International, 2½-ton, No cab, Model M5H-6, Serial #29-942, Engine #30489, Tag #3961              | \$ 2,941.50 |
| #2 | 9-16-46 | Trailer, Bomb Carrier, 1-ton, Mod. 1, 1944, 4 Wheel w/bomb rack & Elec. brakes:                                    |             |
|    |         | Tag No. Serial No.   |             |
|    |         | (a) 1657 57187   | 120.10      |
|    |         | (b) 1653 60542   | 120.10      |
|    |         | (c) 1652 56757   | 120.10      |
|    |         | (d) 1662 60548   | 120.10      |
|    |         | (e) 1660 56980   | 120.10      |
| #3 | 9-16-46 | Trailer, Bomb Carrier, Anthony or Highway Trailer, 1-ton, 1943 Model MK 11, w/bomb rack. Serial #70-573, Tag #2242 | 40.00       |
| #4 | 3-4-46  | 1945 Freuhauf Low-bed Trailers:  |             |
|    |         | Serial No.   |             |
|    |         | (a) 23929  | 2,220.87    |
|    |         | (b) 23952  | 2,220.87    |
|    |         | (c) 23932  | 2,220.87    |

vs. E. B. Hougham, et al.

65

|       | Date    | Item  | Amount      |
|-------|---------|---|-------------|
|       |         | Serial No.  |             |
|       |         | (d) 18662   | \$2,220.87  |
|       |         | (e) 23927   | 2,220.87    |
| #5    | 3- 4-46 | 1942 Diamond T; 4-ton Truck:                                    |             |
|       |         | Serial No. Engine No.   |             |
|       |         | (a) 968-A-0893 133095   | 3,350.00    |
|       |         | (b) 968-A-1732 1200853  | 3,350.00    |
|       |         | (c) 968-A-2422 1206863  | 3,350.00    |
|       |         | (d) 968-A-2148 1203517  | 3,350.00    |
|       |         | (e) 968-A-1446 134924   | 3,350.00    |
| #6    | 3-22-46 | Freuhauf Military 4-ton Trailer:                                |             |
|       |         | Serial No.  |             |
|       |         | (a) 79505   | 583.30      |
|       |         | (b) 74447   | 583.30      |
|       |         | (c) 79472   | 583.30      |
|       |         | (d) 66762   | 583.30      |
|       |         | (e) 66748   | 583.30      |
|       |         | (f) 66715   | 583.30      |
|       |         | (g) 98851   | 583.30      |
|       |         | (h) 97005   | 583.30      |
| #7    | 6-26-46 | 1941 Dodge 1½-ton Truck, Serial #8685927, Engine #T-207-16682   | 399.90      |
| #8    | 7- 1-46 | 1942 Chevrolet 1½-ton Truck, Serial #6NK07-7528, Engine #456004 | 1,016.82    |
| #9    | 8- 1-46 | 1940 Dodge 1½-ton Truck, Serial #8642729, Engine #T207-3442     | 315.85      |
| #10   | 9-30-46 | Truck 1½-ton Dodge Weapon Carrier, Engine #T215-24851           | 295.81      |
| Total |         |   | \$38,131.13 |

(3) The War Assets Administration sales as described herein were limited to World War II veterans for their personal use or use in their own enterprise. The defendant E. B. Hougham caused the defendant William E. Schwartz to certify and represent to the War Assets Administration that the aforesaid surplus property was being bought for the defendant William E. Schwartz's personal use, or for use in William E. Schwartz's own individual enterprise; and further to certify and represent a mailing address that in fact was fictitious; that Schwartz Truck Rental was situated at an address which was in fact fictitious; that Schwartz was operating an individual proprietorship; that such enterprise was already established, that Schwartz was or will be, directly or indirectly the sole proprietor of the enterprise described in the certification; that no person or persons other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof; that the property was not procured for the purpose of resale; that property is to be used in and as part of the enterprise described in the application, and [71] that all of the statements were true to the best of Schwartz's knowledge and belief. That defendant Schwartz did so represent and certify to the United States.

(4) That the aforesaid certification and representations were false and were known by defend-

ants Hougham and Schwartze to be false at the time said certifications and representations were made.

Count Three

I.

Plaintiff, United States of America, repeats and realleges as part of this cause of action each and all of the allegations contained in paragraphs I, II, IV, V, VI, and VIII of its First Cause of Action and makes them a part hereof with like effect as if the same were set forth herein in full, and further alleges:

II.

The defendant, Harlan L. McFarland, is an individual and resides within the jurisdiction of this Court.

III.

The defendants, E. B. Hougham and Harlan L. McFarland employed the following fraudulent tricks, schemes, and devices to obtain surplus property from the United States:

(1) During the year 1946, the defendants, E. B. Hougham and Harlan L. McFarland, induced, conspired, combined, and entered into agreements with one another to use the defendant Harlan L. McFarland's veteran's priority certificate to obtain surplus property for the defendant, E. B. Hougham, from the War Assets Administration, an agency of the United States.

(2) During the year 1946, the defendants, E. B. Hougham and Harlan L. McFarland, attended War Assets Administration sales for veterans only. The defendant, E. B. Hougham selected and paid for the following trucks and trailers, which [72] were purchased on the dates and for the amounts indicated through the use of the defendant Harlan L. McFarland's veteran's certificate for which service the defendant, E. B. Hougham, paid the defendant, Harlan L. McFarland:

| #  | Date    | Item   | Amount   |
|----|---------|--|----------|
| #1 | 7- 2-46 | Trailer, Highway Trailer Co., 1943, bomb rack, 1-ton W.B. 56", 4 wheels, tires 600x9 4-ply, Model MK 11: |          |
|    |         | Tag No. Serial No.   |          |
|    |         | (a) 1881 70125   | \$125.60 |
|    |         | (b) 1882 70071   | 125.60   |
|    |         | (c) 1883 70069   | 125.60   |
|    |         | (d) 1884 A1322313  | 125.60   |
|    |         | (e) 1879 A1323267  | 125.60   |
|    |         | (f) 1877 A1323269  | 125.60   |
|    |         | (g) 1878 A1323342  | 125.60   |
|    |         | (h) 1880 68562   | 125.60   |
|    |         | (i) 1887 Unknown   | 125.60   |
|    |         | (j) 1888 A1323082  | 125.60   |
|    |         | (k) 1885 Unknown   | 125.60   |
|    |         | (l) 1886 A1322315  | 125.60   |
| #2 | 7- 2-46 | Trailer, Bomb Carrier, 1-ton, 1944, Model 1, 4 Wheel, w/bomb rack and electric brakes:                   |          |
|    |         | Tag No. Serial No.   |          |
|    |         | (a) 1646 56958   | 307.93   |
|    |         | (b) 1645 57703   | 307.93   |
|    |         | (c) 1647 60989   | 307.93   |
|    |         | (d) 1655 61352   | 307.93   |
|    |         | (e) 1654 60998   | 307.93   |
|    |         | (f) 1656 57945   | 307.93   |

|    | Date    | Item   | Amount   |
|----|---------|--|----------|
| #3 | 9-16-46 | Trailer Tank, Rosman, 300 gallon water:  |          |
|    |         | Tag No. Serial No.   |          |
|    |         | (a) 2356 5-95  | \$179.58 |
|    |         | (b) 2357 5-69  | 179.38   |
|    |         | (c) 2358 5-67  | 179.38   |
| #4 | 9-16-46 | Trailer, Bomb Carrier, 1-ton, Model 1, 1944, 4-Wheel, w/bomb rack & electric brakes:                 |          |
|    |         | Tag No. Serial No.   |          |
|    |         | (a) 1620 57433   | 123.10   |
|    |         | (b) 1621 57274   | 123.10   |
| #5 | 9-16-46 | Truck, Oilfield, International, 2½-ton, no cab, Model M5H6, Serial #33-117, Engine #34437, Tag #3983 | 3,015.04 |
| #6 | 3-21-46 | (a) Truck, 1942 Chevrolet, 1½-ton, Serial #6NK21-334, Motor #BV480054                                | 1,312.86 |
|    |         | (b) Truck, 1943 Chevrolet, 1½-ton, Serial #9NK33-3640, Motor #BV530844                               | 1,476.96 |
| #7 | 4-8-46  | (a) Truck, 1941 Dodge, ½-ton, Serial #8660792, Motor #T207-4712                                      | 615.00   |
|    |         | (b) Truck, 1942 Dodge, ¾-ton, Serial #81588893, Motor #T214-58225                                    | 590.46   |
|    |         | (c) Truck, 1942 Dodge, ¾-ton, Serial #81579658, Motor #T214-58716                                    | 533.11   |
|    |         | (d) Truck, 1942 Dodge, ¾-ton, Serial #81620672, Motor #T214-99856                                    | 626.46   |
|    |         | (e) Truck, 1942 Dodge, ¾-ton, Serial #81620373,  |          |

resent a mailing address which was in fact fictitious, that McFarland was operating an enterprise at an address which was in fact fictitious, that McFarland was operating an individual proprietorship, that such enterprise was already established, that McFarland was or will be directly or indirectly the sole proprietor of the enterprise described in the certification, that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof, that the property was not procured for purpose of resale, that the property is to be used in and as part of the enterprise described in the application, and that all of the statements were true to the best of McFarland's knowledge and belief. That defendant McFarland did so represent and certify to the United States.

(4) That the aforesaid certification and representations were false and were known by defendants Hougham and McFarland to be false at the time said certifications and representations were made.

Wherefore, the plaintiff demands judgment against the [77] defendants as follows:

1. Against the defendant, Owen Dailey, on the First Count, to pay to the United States as liquidated damages, the sum of \$2,000 for each act committed by him that is determined by the Court to

be in violation of Section 26(b) of the Surplus Property Act of 1944.

2. Against the defendant, William E. Schwartze, on the Second Count, to pay to the United States as liquidated damages, the sum of \$2,000 for each act committed by him that is determined by the Court to be in violation of Section 26(b) of the Surplus Property Act of 1944.

3. Against the defendant, Harlan L. McFarland, on the Third Count, to pay to the United States as liquidated damages, the sum of \$2,000 for each act committed by him that is determined by the Court to be in violation of Section 26(b) of the Surplus Property Act of 1944.

4. Against the defendant, E. B. Hougham, individually and doing business as Bakers Motor Market, on all Three Counts, to pay to the United States as liquidated damages, the sum of \$2,000 for each act committed by him that is determined by the Court to be in violation of Section 26(b) of the Surplus Property Act of 1944.

5. For costs of suit incurred herein.

6. For such other relief as to the Court may seem just and equitable.

LAUGHLIN E. WATERS,  
United States Attorney;

MAX F. DUETZ,  
Asst. U. S. Attorney,  
Chief of Civil Division;

RICHARD A. LAVINE,  
Asst. U. S. Attorney;

/s/ RICHARD A. LAVINE,  
Attorneys for Plaintiff.

[Endorsed]: Filed January 31, 1957. [78]

---

[Title of District Court and Cause.]

**ANSWER TO SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL**

Come now the defendants E. B. Hougham, individually and doing business as Baker's Motor Market, Owen Dailey, William E. Schwartz, and Harlan L. McFarland, in answer to the Second Amended Complaint of plaintiff, and admit, deny and allege as follows:

**Answer to First Cause of Action**

**I.**

Answering Paragraph IV, defendants deny the allegations contained in the last sentence thereof.

Defendants further allege that in addition to being designed to afford returning veterans an opportunity to establish themselves as proprietors of agricultural businesses and professional enterprises said Act was also designed to accomplish the following objectives:

- (a) To give maximum aid to the re-establishment of a peace-time economy of free, independent, private enterprise. [79]
- (b) To develop to the maximum independent operators in trade;
- (c) To stimulate full employment;
- (d) To preserve the competitive position of small business concerns in an economy of free enterprise;
- (e) To encourage and foster post war employment opportunities;
- (f) To foster the wide distribution of surplus commodities to consumers at fair prices;
- (g) To effect broad and equitable distribution of surplus property;
- (h) To achieve the prompt and full utilization of surplus property at fair prices to the consumer through disposal at home with due regard for the protection of free markets and competitive prices;
- (i) To utilize normal channels of trade and commerce to the extent consistent with economic distribution and the promotion of the general objectives of the Surplus Property Act of 1944;
- (j) To promote production, employment of labor; and
- (k) To prevent, insofar as possible, unusual or excessive profits being made out of surplus property.

## II.

Defendants deny positively the allegations contained in Paragraphs V, VI and VIII.

## III.

Answering Paragraph VII, defendants deny employing any fraudulent tricks, schemes and/or devices to obtain surplus property from the United States, and in respect to the allegations contained in the sub-paragraphs contained in Paragraph VII, defendants further admit, deny and allege as follows:

1. Defendants deny the allegations contained in paragraph [80] (1).

2. Defendants deny the allegations contained in paragraph (2), excepting as follows:

(a) Defendant Owen Dailey did engage in certain transactions involving types of articles described in said paragraph, but defendants are lacking in knowledge or information sufficient to enable them to answer as to the items specifically, and so basing their denial defendants deny that transactions involving the items described in Paragraph VII took place, save and excepting Item No. 10 in Paragraph VII (2), and in respect to said item defendants allege that the jeep described therein was purchased by Owen Dailey upon his representation and certification that it was for his personal use and that said item was purchased by Dailey with his own funds and for his own personal

use, and that said item was retained and used by Owen Dailey for his personal use.

3. Answering said Paragraph VII (3) of Plaintiff's Complaint, defendants admit, deny and allege as follows:

(a) Defendants deny the allegations contained in the first sentence thereof.

(b) Defendants deny that the defendant E. B. Hougham caused the defendant Owen Dailey to make any certifications or representations to the War Assets Administration.

(c) Defendant Owen Dailey admits that he certified and represented to the War Assets Administration that the property was bought for use in his own individual enterprise, and further alleges that he advised the War Assets Administration that his enterprise consisted of being an automobile broker and dealer and that he intended, with the exception of the jeep before mentioned, to resell each item purchased by him from the War Assets Administration under a priority certificate.

(d) Defendant Owen Dailey admits having [81] certified and represented as alleged in said paragraph, with the exception of the following:

(1) The assertion "The funds for the enterprise were being put up by Dailey," which assertion defendants deny.

(2) Defendants deny that Dailey unqualifiedly asserted and/or certified that the purchase was not

for the benefit of any other enterprise, dealer, broker, merchant or other undisclosed principal, and allege in this regard that the assertion was qualified to the extent that any purchaser whom Dailey might find for the property might and necessarily must indirectly benefit by Dailey's purchase.

4. Answering Paragraph VII (4), defendants deny each and every allegation therein contained.

#### IV.

Further answering said First Cause of Action, defendants deny that they are liable to pay to the United States the sum of \$2,000.00 for each act committed by them, and specifically deny that they or any of them engaged in any fraudulent trick, scheme or device for the purpose of securing or obtaining or aiding or aiding to secure or obtain, for any person, any payment, property, or other benefits from the United States or any government agency in connection with the disposition of property under the War Surplus Act of 1944, and deny having entered into any agreement, combination or conspiracy to do any of the foregoing.

#### Answer to Second Cause of Action

##### I.

Defendants repeat and reallege as a part of their answer to this cause of action each and all admissions and denials set forth in the answer to the First Cause of Action in respect to those paragraphs of the First Cause of Action referred to and

incorporated by reference into the Second Cause of Action as alleged in Paragraph I thereof. [82]

## II.

Answering Paragraph III, defendants deny employing any fraudulent tricks, schemes or devices to obtain surplus property from the United States, and in respect to the allegations contained in the sub-paragraphs contained in Paragraph III the defendants further admit, deny and allege as follows:

1. Defendants deny the allegations contained in paragraph (1):

2. Defendants deny the allegations contained in paragraph (2), except as follows:

(a) Defendant William E. Schwartze did engage in certain transactions involving types of vehicles described in said paragraph, but defendants are lacking in knowledge or information sufficient to enable them to answer as to the items specifically, and so basing their denial defendants deny that the transactions involving the items described in Paragraph III (2) took place, save and except Items Nos. 4, 5 and 6 in said paragraph, and in respect to those items defendant William E. Schwartze admits having purchased them upon his representation and certification that they were purchased for use in his own intended business of truck rentals, and in this respect Defendant Schwartze alleges that he at the time of signing the certificate bona fide intended to enter into and engage in transacting said business, but his plans in that regard were

frustrated by reason of the fact that immediately after the purchase it was ascertained that the equipment was illegal for use upon California highways and for such reason the venture was abandoned and the items disposed of.

3. Answering paragraph (3) of Paragraph III of said cause of action, defendants admit, deny and allege as follows:

(a) Defendants deny the allegations contained in the first sentence thereof, save and except as to Items 4, 5 and 6 in Paragraph III (2). [83]

(b) Defendants deny that the said Defendant E. B. Hougham caused the Defendant William E. Schwartze to make any representation to the War Assets Administration.

(c) Defendant William E. Schwartze admits that he certified and represented to the War Assets Administration that the said Items Nos. 4, 5 and 6 described in Paragraph III (2) were bought for his personal use or for use in his individual enterprise, and further alleges that he advised the War Assets Administration that his intended enterprise was that of truck rental and transportation, and further alleges that after said truck rental venture was frustrated that he advised the War Assets Administration that he was engaged in the enterprise of a used car and truck broker and dealer and with the exception of Items 4, 5 and 6 described in Paragraph III (2) that he intended to resell each item purchased by him from the War Assets Administration under a priority certificate.

(d) Defendant Schwartz denies having certified to a mailing address that in fact was fictitious and he, Defendant Schwartz, denies having certified that an existing business was situated at an address which was in fact fictitious, and in this respect he alleges that the representation was not that the business was in fact in existence but that it was not operating and had not been commenced.

(e) Defendant Schwartz denies that he represented that the enterprise was or would be directly or indirectly under his sole proprietorship, and in this respect alleges his certification to be no persons other than "veterans" are or will be interested in the proprietorship.

(f) Defendant Schwartz denies that he represented that the property, other than Items Nos. 4, 5 and 6 described in Paragraph III (2), was not purchased for the purpose of resale.

4. Defendants deny each and every allegation contained in [84] Paragraph III (4).

### III.

Paragraphs IV and V of the Answer to the First Cause of Action are incorporated herein by reference.

### Answer to Third Cause of Action

#### I.

Defendants repeat and reallege as a part of this Cause of Action each and all of the admissions and

denials heretofore set forth in the Answer to the First Cause of Action insofar as the same relate to the paragraphs of the First Cause of Action incorporated by reference into the Third Cause of Action.

## II.

Answering Paragraph III, defendants deny employing any fraudulent tricks, schemes and/or devices to obtain surplus property from the United States, and in respect to the allegations contained in the sub-paragraphs of said Paragraph III defendants further admit, deny and allege as follows:

1. Defendants deny the allegations contained in paragraph (1).

2. Defendants deny the allegations contained in paragraph (2), except as follows:

(a) Defendant Harlan L. McFarland did engage in certain transactions involving types of vehicles described in said paragraph, but defendants are lacking in knowledge or information sufficient to enable them to answer as to the items specifically, and so basing their denial defendants deny that the transactions involving the items described in paragraph (2) took place.

3. Answering paragraph (3), defendants admit, deny and allege as follows:

(a) Defendants deny the allegations contained in the first sentence thereof.

(b) Defendants deny that Defendant E. B. Hougham [85] caused the Defendant Harlan L.

McFarland to make any certifications or representations to the War Assets Administration.

(c) Defendant Owen Dailey admits that he certified and represented to the War Assets Administration that the property was bought for use in his own individual enterprise, and further alleges that he advised the War Assets Administration that his enterprise consisted of being an automobile broker and dealer, and that he intended to resell each item purchased by him from the War Assets Administration under a priority certificate.

(d) Defendant Harlan L. McFarland denies that he certified to a mailing address which was in fact fictitious.

(e) Defendant Harlan L. McFarland denies that he certified that he was operating an enterprise at an address which was fictitious.

(f) Defendant Harlan L. McFarland admits having certified that he was operating an enterprise which was already established.

(g) Defendant Harlan L. McFarland denies that he certified that the property purchased was not procured for the purpose of resale, and in this respect alleges that the property was certified to be purchased for use in his enterprise, which was certified to be that of an auto and truck sales and service.

4. Answering Paragraph III (4) defendants deny each and every allegation therein.

## III.

In further answer to the Third Cause of Action defendants repeat and reallege Paragraphs IV and V of their Answer to the First Cause of Action and incorporate the same herein by reference with the same force and effect as though said incorporated paragraphs were pleaded in full in respect to this Third Cause of Action instead of the First Cause of Action.

And for a Further and Separate Defense to Each of Said [86] Causes of Action Defendants  
Allege:

## I.

That the action is barred by the statute of limitations and specifically by the provisions of Section 2462 of U. S. Code Annotated, Title 28, as modified by the provisions of Section 3287 of U. S. Code Annotated, Title 18, and Presidential Proclamation 2714 12-FR-1) which declared hostilities terminated as of 12 o'clock noon on December 31, 1946, thereby setting the statute of limitations in motion December 31, 1949, and causing the 5 year period within which said action could be maintained to expire December 30, 1954.

And for a Second, Separate and Distinct Defense to Each of Said Causes of Action Defendants  
Allege:

## I.

That even though the original Complaint may have been timely filed by one day, the cause of ac-

tion pleaded in the Second Amended Complaint is so foreign and different from that pleaded in the original Complaint as to constitute a separate and distinct cause of action, and as such the filing of the original Complaint would not operate to toll the statute of limitations, which did in fact expire five years from December 31, 1949, whereas said Second Amended Complaint was not filed until January 18, 1957.

And for a Third, Separate and Distinct Defense to Each of Said Causes of Action Defendants Allege:

I.

That the transactions referred to in said Complaint were within the objectives of the War Surplus Act of 1944, as heretofore alleged in Paragraph I of the Answer to the First Cause of Action, in that they were not isolated transactions but were a part of a series of events emanating from the conduct of the business of Baker's Motor Market over a series of years, commencing in 1924 and continuing until 1953, as follows: [87]

That during said years the Defendant E. B. Hougham conducted a general wholesale and retail used car and truck sales and service business in which he offered for sale to the general public, at reasonable and non-speculative prices, various commodities, including war surplus materials; that the commodities referred to in plaintiff's Complaint were, in fact, purchased by said veterans and resold

to Defendant E. B. Hougham, at prices deemed by said other defendants to establish themselves as them from said transactions; that thereby the Defendant E. B. Hougham assisted and encouraged said other defendants to establish themselves as proprietors of businesses.

## II.

That the Defendant Owen Dailey was known to Defendant Hougham before World War II and was known by Defendant Hougham to possess experience in the automotive retail field; that said Defendant Owen Dailey served in World War II and immediately upon being separated from the service was given employment by Defendant Hougham as an Office and Sales Manager, and was given duties to perform having nothing to do with the matters set forth in Plaintiff's Complaint, and was given continuous employment for a period in excess of 6 months, which enabled said veteran to re-establish himself in a peace-time economy of free and independent enterprise.

## III.

That, the Defendant Harlan L. McFarland for years before World War II had been a retail and wholesale used car dealer, had entered World War II and was discharged therefrom as a veteran, and in attempting to re-establish his business found it difficult to secure finances, as a result of which the Defendant Hougham stocked his (McFarland's) business with merchandise for sale upon a consignment

basis, thus enabling McFarland to establish himself in a peace-time economy and to further the policy of distribution of surplus commodities to consumers through normal channels of trade and [88] commerce.

IV.

That the Defendant William E. Schwartz is the stepson of the Defendant E. B. Hougham, and has been in his family since he was 6 years of age; that immediately after being separated from the service in World War II the Defendant Schwartz was given employment which lasted until 1948, at which time he was established in the farming business by the Defendant Hougham; that during said period of employment no specified wage was given but the opportunity of drawing upon the business for necessary wants was at all times afforded Schwartz, thus enabling him to re-establish himself in the peace-time economy and as a proprietor of a business enterprise.

V.

That commencing in the year 1944 through 1948 the Defendant E. B. Hougham engaged extensively in the distribution of War Surplus property and was himself a customer of the United States on his own account during said period; that the transactions referred to in plaintiff's Complaint constituted less than 10% of the gross business of the Defendant Hougham during the year 1946; that in the transaction of said business all of said war surplus materials handled by Defendant Hougham were sold to the general public at fair prices which re-

sulted in a broad and equitable distribution of surplus property and which enabled the Defendant Hougham to employ veterans and thus re-establish them in the post-war era.

Wherefore, defendants pray that plaintiff take nothing, that they be allowed their costs of Court, and for such other and further relief as may be meet and proper in the premises, and defendants demand that the trial of the above-entitled action be had before a jury.

CHARLES CARR and  
CONRON, HEARD & JAMES,

By /s/ CALVIN H. CONRON,  
Attorneys for Defendants E. B. Hougham Individ-  
ually and Doing Business as Baker's Motor  
Market; Owen Dailey; William E. Schwartz  
and Harlan L. McFarland.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 6, 1957. [89]

---

[Title of District Court and Cause.]

### PRETRIAL CONFERENCE ORDER

Following pretrial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court,

It Is Ordered:

I.

This is a civil action brought by the United States of America as plaintiff, under the provisions of Section 26(b) of the Surplus Property Act of 1944, 50 U.S.C. App. 1635(b), repealed and re-enacted as Section 209(b) of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 239(b), and renumbered as 40 U.S.C. 489(b) for damages for alleged fraudulent purchase of government property.

II.

Federal jurisdiction is invoked under the provisions of: [92]

A. Section 26(c) of the Surplus Property Act of 1944, repealed and re-enacted as Section 209(c) of the Federal Property and Administrative Services Act of 1949.

B. Title 28 U.S.C. Section 1345, in that this is an action commenced by the United States.

III.

The following facts are admitted and require no proof:

A. Count One.

1. Defendant E. B. Hougham is an individual and resides within the jurisdiction of this Court. At all times mentioned in the Second Amended Complaint, Hougham was doing business under the fictitious firm name of Baker's Motor Market and within the jurisdiction of this Court.

2. Defendant Owen Dailey is an individual and resides within the jurisdiction of this Court.

3. Defendant Owen Dailey admits that he certified and represented to the War Assets Administration that the property was bought for use in his own individual enterprise.

**B. Count Two.**

1. Defendant William E. Schwartz is an individual and resides within the jurisdiction of this Court.

2. Defendant William E. Schwartz admits that he certified and represented to the War Assets Administration that the Items Nos. 4, 5 and 6 described in Paragraph III (2) of the Second Amended Complaint were bought for his personal use or for use in his individual enterprise.

**C. Count Three.**

1. Defendant Harlan L. McFarland is an individual and resides within the jurisdiction of this Court.

2. Defendant Harlan L. McFarland admits that he certified and represented to the War Assets Administration that certain property was bought for use in his own individual enterprise. [93]

**IV.**

The reservations as to facts recited in Paragraph III above are as follows:

A. 3. Defendant Owen Dailey further alleges that the property was bought for use in his own individual enterprise, and further alleges that he advised the War Assets Administration that his enterprise consisted of being an automobile broker and dealer and that he intended, with the exception of a certain jeep, to resell each item purchased by him from the War Assets Administration under a priority certificate.

B. 2. Defendant William E. Schwartze further alleges that he advised the War Assets Administration that his intended enterprise was that of truck rental and transportation, and further alleges that after said truck rental venture was frustrated that he advised the War Assets Administration that he was engaged in the enterprise of a used car and truck broker and dealer, and with the exception of Items 4, 5 and 6 described in Paragraph III (2) of the Second Amended Complaint, that he intended to resell each item purchased by him from the War Assets Administration under a priority certificate.

C. 2. Defendant Harlan L. McFarland further alleges that he advised the War Assets Administration that his enterprise consisted of being an automobile broker and dealer, and that he intended to resell each item purchased by him from the War Assets Administration under a priority certificate.

## V.

The following issues of fact, and no others, remain to be litigated at the trial, with respect to plaintiff's complaint:

A. First Cause of Action—Dailey and Hougham.

(1) That defendants Dailey and Hougham used, or engaged in, or caused to be used or engaged in, certain fraudulent tricks, schemes and devices, for the purpose of securing or obtaining or [94] aiding to secure or obtain government property from the United States and/or the War Assets Administration in connection with the procurement, transfer or disposition of property under the Surplus Property Act of 1944.

(2) During 1946 said defendants did agree, combine and conspire to use or engage in or cause to be used or engaged in certain fraudulent tricks, schemes and devices, for the purpose of securing or obtaining or aiding to secure or obtain government property from the United States and/or the War Assets Administration in connection with the procurement, transfer or disposition of property under the Surplus Property Act of 1944.

(3) Said defendants employed the following fraudulent tricks, schemes, and devices to obtain surplus property from the United States:

(a) During the year 1946 said defendants induced, conspired, combined and entered into agreements with one another to use Dailey's veteran's priority certificate to obtain surplus property for Hougham from the War Assets Administration.

(b) In 1946 said defendants attended War Assets Administration sales for veterans only. Hougham selected and paid for certain trucks and

trailers purchased on dates and for the amounts set forth more particularly on pages 4, 5, 6, and 7 of the First Cause of Action in the Second Amended Complaint.

(c) The War Assets Administration sales were limited to World War II veterans for their [95] personal use or use in their own enterprise. Hougham caused Dailey to certify and represent to the War Assets Administration that said surplus property was being bought for use in Dailey's own individual enterprise, and further to certify and represent that such an enterprise was at that time established, that Dailey was at that time operating it, that Dailey was the only person financially interested in the enterprise, that the funds for the enterprise were being put up by Dailey, that Dailey was not purchasing the property for the benefit of any other enterprise, dealer, broker, merchant, or other undisclosed partner or principal, that the enterprise was one in which more than 50% of the invested capital or net income thereof was owned by or accrued to Dailey, and that all the statements made in the application were true and complete to the best of the knowledge and belief of Dailey. That Dailey did so represent and certify to the United States.

(d) That said certification and representations were false and were known by Hougham and Dailey to be false at the time said certification and representations were made.

(4) That said defendants became and are liable to pay to the United States the sum of \$2,000 for each act committed by them that was determined by the court to be in violation of said statute. [96]

**B. Second Cause of Action—Hougham and Schwartz.**

(1) That defendants Hougham and Schwartz employed the following fraudulent tricks, schemes and devices to obtain surplus property from the United States:

(a) During 1946 Hougham and Schwartz induced, conspired, combined, and entered into agreements with one another to use the defendant Schwartz's veteran's priority certificate to obtain surplus property for Hougham from the War Assets Administration.

(b) During 1946 Hougham and Schwartz attended War Assets Administration sales for veterans only. Hougham selected and paid for trucks and trailers purchased on the dates and for the amounts indicated, through the use of Schwartz's veteran's certificate for which service Hougham paid Schwartz. The dates, amounts and items are set forth more particularly on pages 9, 10 and 11 of the Second Cause of Action of the Second Amended Complaint.

(c) That said War Assets Administration sales were limited to World War II veterans for their personal use or use in their own enterprise. Hougham caused Schwartz to certify and represent

to the War Assets Administration that said surplus property was being bought for Schwartz's personal use, or for use in Schwartz's own individual enterprise; and further to certify and represent a mailing address that in fact [97] fictitious; that Schwartz was operating an individual proprietorship; that such enterprise was already established; that Schwartz was or will be, directly or indirectly, the sole proprietor of the enterprise described in the certification; that no person or persons other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50% of either the capital invested in the enterprise or of the gross profits or income thereof; that the property was not procured for the purpose of resale; that the property is to be used in and as a part of the enterprise described in the application, and that all of the statements were true to the best of Schwartz's knowledge and belief. That Schwartz did so represent and certify to the United States.

(d) That the said certification and representations were false and were known by Hougham and Schwartz to be false at the time said certification and representations were made.

(2) That during 1946 said defendants used, or engaged in, or caused to be used or engaged in, certain fraudulent tricks, schemes and devices, described above, for the purpose of securing or obtaining or aiding to secure or obtain government

property from the United States and/or the War Assets Administration in connection with the procurement, [98] transfer or disposition of property under the Surplus Property Act of 1944.

(3) During 1946 said defendants did agree, combine, and conspire to use or engage in or cause to be used or engaged in certain fraudulent tricks, schemes and devices, described above, for the purpose of securing or obtaining or aiding to secure or obtain government property from the United States and/or the War Assets Administration in connection with the procurement, transfer or disposition of property under the Surplus Property Act of 1944.

C. Third Cause of Action—Hougham and McFarland.

(1) During 1946 Hougham and McFarland did use, or engage in, or cause to be used or engaged in, certain fraudulent tricks, schemes and devices, described hereinafter, for the purpose of securing or obtaining or aiding to secure or obtain government property from the United States and/or the War Assets Administration in connection with the procurement, transfer or disposition of property under the Surplus Property Act of 1944.

(2) During 1946, said defendants did agree, combine, and conspire to use or engage in or cause to be used or engaged in certain fraudulent tricks, schemes and devices, described hereinafter, for the purpose of securing or obtaining or aiding to secure

or obtain government property from the United States and/or the War Assets Administration in connection with the procurement, transfer or disposition of property under the Surplus [99] Property Act of 1944:

(a) During 1946, Hougham and McFarland induced, conspired, combined, and entered into agreements with one another to use McFarland's veteran's priority certificate to obtain surplus property for Hougham from the War Assets Administration.

(b) During 1946, Hougham and McFarland attended War Assets Administration sales for veterans only. Hougham selected and paid for trucks and trailers purchased on the dates and for the amounts indicated through the use of McFarland's veteran's certificate, for which service Hougham paid McFarland. The dates, amounts and items are set forth more particularly on pages 13, 14, 15, 16 and 17 of the Second Amended Complaint.

(c) The War Assets Administration sales were limited to World War II veterans holding certificates to purchase for their personal use or in their own enterprise. Hougham caused McFarland to certify and represent to the War Assets Administration that said surplus property was being bought for use in McFarland's own individual enterprise; and further to certify and represent a mailing address which was in fact fictitious, that McFarland was operating an enterprise at an address which was in fact fictitious, that McFarland was operating an individual proprietorship, that such enter-

prise was already established, that McFarland [100] was or will be directly or indirectly the sole proprietor of the enterprise described in the certification, that no person or persons, other than veterans, had or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50% of either the capital invested in the enterprise or of the gross profits or income thereof, that the property was not procured for purpose of resale, that the property is to be used in and as part of the enterprise described in the application, and that all of the statements were true to the best of McFarland's knowledge and belief. That McFarland did so represent and certify to the United States.

(d) Said certification and representations were false and were known by Hougham and McFarland at the time said certification and representations were made.

## VI.

In addition thereto, defendants assert that the following constitute defenses to the matters set forth in the Second Amended Complaint:

A. As a further defense defendants allege that the transactions referred to in the Second Amended Complaint were within the objectives of the Surplus Property Act of 1944, in that they were not isolated transactions but were a part of a series of events emanating from the conduct of the business of Bakers Motor Market over a series of years, commencing in 1924 and continuing until 1953, as

more particularly set forth on page 10 of Defendants' Answer to Second Amended Complaint. [101]

B. That Dailey was known to Hougham before World War II and was known by Hougham to possess experience in the automotive retail field; that Dailey served in World War II and immediately upon being separated from the service was given employment by Hougham as an Office and Sales Manager, and was given duties to perform having nothing to do with the matters set forth in plaintiff's complaint, and was given continuous employment for a period in excess of 6 months, which enabled said veteran to re-establish himself in a peace-time economy of free and independent enterprise.

C. That McFarland for years before World War II had been a retail and wholesale used car dealer, had entered World War II and was discharged therefrom as a veteran, and in attempting to re-establish his business found it difficult to secure finances, as a result of which Hougham stocked McFarland's business was merchandise for sale upon a consignment basis, thus enabling McFarland to establish himself in peace-time economy and to further the policy of distribution of surplus commodities to consumers through normal channels of trade and commerce.

D. That Schwartz is the stepson of Hougham, and has been in his family since he was 6 years of age; that immediately after being separated from

the service in World War II Schwartz was given employment which lasted until 1948, at which time he was established in the farming business by Hougham; that during said period of employment no specified wage was given but the opportunity of drawing upon the business for necessary wants was at all times afforded Schwartz, thus enabling him to re-establish himself in the peace-time economy and as a proprietor of a business enterprise.

E. That commencing in the year 1944 through 1948 Hougham [102] engaged extensively in the distribution of War Surplus property and was himself a customer of the United States on his own account during said period; that the transactions referred to in plaintiff's complaint constituted less than 10% of the gross business of Hougham during the year 1946; that in the transaction of said business all of said war surplus materials handled by Hougham were sold to the general public at fair prices which resulted in a broad and equitable distribution of surplus property and which enabled Hougham to employ veterans and thus re-establish them in the post-war era.

F. With respect to subparagraphs A and E above, it is plaintiff's contention that such allegations are irrelevant to any defense of the defendants. With respect to subparagraphs B, C and D above, it is plaintiff's contention that such allegations, if proved, do not in themselves constitute a defense to this action, but may be considered by the court and jury in determining whether in fact

there were false certifications, and the intent of the parties in so doing.

### VII.

The following issues of law, and no others, remain to be litigated upon the trial:

A. The nature of the statutory purposes of the Surplus Property Act of 1944.

B. It is the contention of plaintiff that it is entitled to double the amount of the sales price of the vehicles described in the Second Amended Complaint, namely twice the sum of \$13,671.02 for Count One, twice the sum of \$38,131.13 for Count Two, and twice the sum of \$27,710.51 for Count Three. Previously the Court has indicated that an irrevocable election has been made by the United States by virtue of the successive complaints on file. It is the contention of plaintiff that it is entitled to make its election [103] at any time prior to judgment. Plaintiff elects, in the event of judgment in its favor, to receive as liquidated damages a sum equal to twice the consideration agreed to be given to the United States or federal agency involved. Plaintiff respectfully calls this to the attention of the Court so that the point may be preserved for purposes of appeal.

C. Defendants assert that this action is barred by the Statute of Limitations, as more particularly set forth in Title 28, Section 2462, as modified by the provisions of Title 18, Section 3287 and Presidential Proclamation 2714 (12-FR-1).

D. Defendants contend that even though the original complaint may have been filed timely by one day, that the causes of action set forth in the Second Amended Complaint are so foreign and different from those pleaded in the original complaint as to constitute separate and distinct causes of action, and that therefore the filing of the original complaint did not operate to toll the Statute of Limitations.

### VIII.

The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

That the defendants waive any objection as to foundation as to the following named exhibits and agree that copies, or photostatic copies, may be offered in evidence, with like effect as if the original thereof were offered. In this respect said defendants reserve any objections to the admission of such documents on the ground of relevancy or materiality. Said exhibits are described as follows:

#### Exhibits

1—Veteran's Application, V-10A55767, dated July 29, 1949.

2—Dailey's Statement to F.B.I., May 9, 1947.

5—Veteran's Preference Certificate dated July 29, 1946. [104]

8-75 inc.—Sales Folders, including bills of sale, invoices and similar material comprising alleged sales to Dailey, as set forth in plaintiff's First Cause of Action.

76—Veteran's Application, 10A24067, dated March 20, 1946.

77—Folder containing certifications of Schwartze concerning purchases of vehicles.

81-109 inc.—Sales Folders or Sales Documents comprising bills of sale, invoices and related material for alleged purchases of vehicle by Schwartze, as set forth more particularly in the Second Cause of Action.

110—Veteran's Application, V33D33964, dated July 2, 1946.

111—Certification of McFarland by the War Assets Administration, pursuant to application.

112—McFarland's statement to F.B.I., May 6, 1947.

113—Veteran's Application, 10A24063, dated March 20, 1946.

114—Miscellaneous Veteran's Preference Certificates of McFarland.

117-168 inc.—Sales Folders or Sales Documents comprising bills of sale, invoices and similar material connected with alleged purchases by McFarland of vehicles, as more particularly set forth in the Third Cause of Action.

B. In addition, plaintiff intends to introduce the following documents into evidence, with respect to which there is no stipulation as to foundation or admissibility, or otherwise:

**Exhibits.**

- 3—Sales Catalogue No. 45324.
- 4—Sales Catalogue No. 46069.
- 6—Sales Catalogue No. 45968.
- 7—Sales Catalogue No. 45954.
- 78—Sales Catalogue No. 45233.
- 79—Sales Catalogue No. 45262.
- 80—Sales Catalogue No. 45378.
- 115—Sales Catalogue No. 45350.
- 116—Sales Catalogue No. 45283.

**IX.**

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated: August 31, 1957.

/s/ GILBERT H. JERTBERG,  
United States District Judge.

Approved as to form and context:

LAUGHLIN E. WATERS,  
United States Attorney;

**RICHARD A. LAVINE,**

Assistant U. S. Attorney,  
Chief of Civil Division;

/s/ **RICHARD A. LAVINE,**

Assistant U. S. Attorney,  
Attorneys for Plaintiff.

**CONRON, HEARD & JAMES,**

By /s/ **CALVIN H. CONRON, JR.,**  
Attorneys for Defendants.

Lodged August 28, 1957. ◊

[Endorsed]: Filed September 3, 1957. [106]

---

[Title of District Court and Cause.]

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND JUDGMENT**

Trial of the above-entitled case having been duly noticed, jury trial having been waived, the above-entitled action was tried by the Court before United States District Judge Gilbert H. Jertberg, on September 24, 25, 26 and 27, 1957, Laughlin E. Waters, United States Attorney, and Richard A. Lavine, Assistant United States Attorney, having appeared as counsel for the plaintiff, United States; Conron, Heard & James, having appeared as counsel for defendants, E. B. Hougham, individually and doing business as Bakers Motor Market; Owen Dailey,

William E. Schwartze, and Harlan L. McFarland, the Court makes the following:

### Findings of Fact

#### Count One

##### I.

During 1946, E. B. Hougham and Owen Dailey did use and engage in and caused to be used and engaged in fraudulent tricks, [107] schemes and devices, for the purpose of securing, obtaining and aiding to secure and obtain Government property from the United States and the War Assets Administration in connection with the procurement, transfer and disposition of property under the Surplus Property Act of 1944.

##### II.

During 1946, E. B. Hougham and Owen Dailey did agree, combine and conspire to use and engage in and caused to be used and engaged in certain fraudulent tricks, schemes and devices for the purpose of securing, obtaining and aiding to secure and obtain Government property from the United States and the War Assets Administration in connection with the procurement, transfer and disposition of property under the Surplus Property Act of 1944.

##### III.

Such fraudulent tricks, schemes and devices by E. B. Hougham and Owen Dailey to obtain surplus property from the United States were as follows:

(1) During the year 1946, E. B. Hougham and Owen Dailey, induced, conspired, combined and entered into agreements with one another to use Owen Dailey's veteran's priority certificate to obtain surplus property for E. B. Hougham from the War Assets Administration.

(2) During the year 1946, Owen Dailey attended War Assets Administration sales for veterans only. E. B. Hougham selected and paid for certain trucks and trailers, through the use of defendant Owen Dailey's veteran's certificate, for which service, E. B. Hougham paid Owen Dailey. Said trucks and trailers were purchased on various dates, commencing July 31, 1946, to and including September 30, 1946. Said trucks and trailers are further described in the Second Amended Complaint, Count One, Paragraph VII, pages 4-7, inclusive.

(3) The said War Assets Administration sales were [108] limited to World War II veterans for their personal use or use in their own enterprise. E. B. Hougham caused Owen Dailey to certify and represent to War Assets Administration that the said surplus property was being bought for use in Dailey's own individual enterprise; and further to certify and represent that such an enterprise was at that time established, that Dailey was at that time operating it, that Dailey was the only person financially interested in the enterprise, that the funds for the enterprise were being put up by Dailey, that Dailey was not purchasing the property described for the benefit of any other enterprise,

dealer, broker, merchant, or other undisclosed partner or principal, that the enterprise was one in which more than 50% of the invested capital or net income thereof was owned by or accrued to Dailey, and that all of the statements made in the application were true and complete to the best of the knowledge and belief of Dailey. That Dailey did so represent and certify to the United States.

(4) The aforesaid certification and representations were false and were known by Hougham and Dailey to be false at the time said certification and representations were made.

#### IV.

Defendants E. B. Hougham and Owen Dailey became and are jointly and severally liable to pay to the United States the sum of \$2,000 as liquidated damages for one act pursuant to the provisions of Section 26(b) of the Surplus Property Act of 1944 for Count One. Said one act is the presentation to the War Assets Administration of Veterans Application for Surplus Property in the name of Owen N. Dailey, Case No. V10A 55767, dated 29, 1946.

#### Count Two

#### V.

During 1946, E. B. Hougham and William E. Schwartze did use and engage in and caused to be used and engaged in certain [109] fraudulent tricks, schemes and devices, for the purpose of securing, obtaining and aiding to secure and obtain Govern-

ment property from the United States and the War Assets Administration in connection with the procurement, transfer and disposition of property under the Surplus Property Act of 1944.

VI.

During 1946, E. B. Hougham and William E. Schwartz did agree, combine and conspire to use and engage in and cause to be used and engaged in certain fraudulent tricks, schemes and devices, for the purpose of securing, obtaining and aiding to secure and obtain Government property from the United States and the War Assets Administration in connection with the procurement, transfer and disposition of property under the Surplus Property Act of 1944.

VII.

E. B. Hougham and William E. Schwartz employed the following fraudulent tricks, schemes and devices to obtain surplus property from the United States:

(1) During the year 1946, Hougham and Schwartz, induced, conspired, combined and entered into agreements with one another to use Schwartz's veteran's priority certificate to obtain surplus property for Hougham from the War Assets Administration.

(2) During the year 1946, Schwartz attended War Assets Administration sales for veterans only. Hougham selected and paid for certain trucks and trailers, which were purchased through the use of

Schwartz's veteran's certificate, for which service, Hougham paid Schwartz. Said trucks and trailers were purchased on various dates commencing March 4, 1946, and ending September 30, 1946. Said trucks and trailers are further described in the Second Amended Complaint, Count Two, Paragraph III, pages 9-11, inclusive.

(3) The War Assets Administration sales were limited to World War II veterans for their personal use or use in their [110] own enterprise. E. B. Hougham caused William E. Schwartz to certify and represent to War Assets Administration that the said surplus property was being bought for Schwartz's personal use, or for use in Schwartz's own individual enterprise; and further to certify and represent a mailing address that in fact was fictitious; that Schwartz Truck Rental was situated at an address which was in fact fictitious; that Schwartz was operating an individual proprietorship; that such enterprise was already established; that Schwartz was or will be, directly or indirectly the sole proprietor of the enterprise described in the certification; that no person or persons other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof; that the property was not procured for the purpose of resale; that the property is to be used in and as part of the enterprise described in the application, and that all of the state-

ments were true to the best of Schwartz's knowledge and belief. Schwartz did so represent and certify to the United States.

(4) The aforesaid certification and representations were false and were known by Hougham and Schwartz to be false at the time said certifications and representations were made.

### VIII.

Defendants E. B. Hougham and William E. Schwartz became and are jointly and severally liable to pay to the United States the sum of \$2,000 as liquidated damages for one act pursuant to the provisions of Section 26(b) of the Surplus Property Act of 1944 for Count Two. Said one act is the presentation to the War Assets Administration of Veterans Application for Surplus Property in the name of William E. Schwartz, Case No. 10A 24067, dated March 20, 1946. [111]

### Count Three

### IX.

During 1946, E. B. Hougham and Harlan L. McFarland did use and engage in and cause to be used and engaged in certain fraudulent tricks, schemes and devices for the purpose of securing, obtaining and aiding to secure and obtain Government property from the United States and the War Assets Administration in connection with the procurement, transfer, and disposition of property under the Surplus Property Act of 1944.

## X.

During 1946, E. B. Hougham and Harlan L. McFarland did agree, combine and conspire to use and engage in and cause to be used and engaged in certain fraudulent tricks, schemes and devices, for the purpose of securing, obtaining and aiding to secure and obtain Government property from the United States and the War Assets Administration in connection with the procurement, transfer and disposition of property under the Surplus Property Act of 1944.

## XI.

Harlan L. McFarland and E. B. Hougham employed the following fraudulent tricks, schemes and devices to obtain surplus property from the United States:

(1) During the year 1946, E. B. Hougham and Harlan L. McFarland, induced, conspired, combined and entered into agreements with one another to use Harlan L. McFarland's veteran's priority certificate to obtain surplus property for E. B. Hougham, from the War Assets Administration.

(2) During the year 1946, Harlan L. McFarland attended War Assets Administration sales for veterans only. E. B. Hougham selected and paid for trucks and trailers, which were purchased through the use of McFarland's veteran's certificate, for which service Hougham paid Schwartze. Said trucks and [112] trailers were purchased on various dates commencing March 21, 1946, and ending September 16, 1946. Said trucks and trailers are fur-

ther described in the Second Amended Complaint, Count Three, Paragraph III, pages 13-17, inclusive.

(3) The War Assets Administration sales were limited to World War II veterans holding certificates to purchase for their personal use or in their own enterprise. E. B. Hougham caused Harlan L. McFarland to certify and represent to War Assets Administration that said surplus property was being bought for use in Harlan L. McFarland's own individual enterprise; and further to certify and represent a mailing address which was in fact fictitious, that McFarland was operating an enterprise at an address which was in fact fictitious, that McFarland was operating an individual proprietorship, that such enterprise was already established, that McFarland was or will be directly or indirectly the sole proprietor of the enterprise described in the certification, that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof, that the property was not procured for purpose of resale, that the property is to be used in and as part of the enterprise described in the application, and that all of the statements were true to the best of McFarland's knowledge and belief. McFarland did so represent and certify to the United States.

(4) The aforesaid certification and representations were false and were known by Hougham and

McFarland to be false at the time said certifications and representations were made.

## XII.

Defendants E. B. Hougham and Harlan L. McFarland became and are jointly and severally liable to pay to the United States [113] the sum of \$2,000 as liquidated damages for each act pursuant to the provisions of Section 26(b) of the Surplus Property Act of 1944. There are two such acts committed in this case. The first act is the presentation to the War Assets Administration of Veterans Application for Surplus Property in the name of Harlan L. McFarland, Case No. 10A 24063, dated March 20, 1946. The second act is the presentation to the War Assets Administration of Veterans Application for Surplus Property in the name of Harlan L. McFarland, Case No. V33D33964, dated July 2, 1946. Therefore E. B. Hougham and Harlan L. McFarland are jointly and severally liable in the total sum of \$4,000.00 for Count Three.

Based upon the foregoing Findings of Fact, the Court makes the following:

## Conclusions of Law.

### I.

This Court has jurisdiction of this action by virtue of Section 26(c) of the Surplus Property Act of 1944, repealed and re-enacted as Section 209(c) of the Federal Property and Administrative Services Act of 1949; and in addition Title 28 U.S.C.

Section 1345, in that this is an action commenced by the United States,

## II.

The Congress of the United States enacted the Surplus Property Act of 1944 in order to facilitate and regulate the orderly disposal of Government surplus property. Among other things, the Act was expressly designed to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business and professional enterprises. Pursuant to this Act, the War Assets Administration, an agency of the United States, was duly authorized and directed to dispose of Government surplus property. The disposal program of the War Assets Administration included the sales at which the only eligible purchasers [114] were veterans of World War II. In order to be certified as an eligible purchaser and as a condition precedent to the same, a veteran had to certify and represent that the intended use of the surplus property was for specified restricted purposes, and in certain instances, that he had the required occupational qualifications.

## III.

In the original complaint, the plaintiff, United States, sought damages under the provisions of Section 26(b)(1) of the Surplus Property Act of 1944 (58 Stat. 765 at 780), for \$2,000 for each act, and double the amount of damages which the United States may have sustained. The United States has not sought to prove pursuant to the Second

Amended Complaint, and has not proved any actual damages sustained in this case. In the course of the various motions and pretrial proceedings in this case, the plaintiff United States on November 2, 1956, filed its Motion and Notice of Motion to File First Amended Complaint, which was opposed by defendants. This Court ruled, in considering such Motion and other pretrial matters, that because of the fact that the United States had theretofore elected to proceed under the provisions of Section 26(b)(1) of the Surplus Property Act of 1944 to seek liquidated damages of \$2,000 for each act, that such constituted an irrevocable election, and that the United States could not elect, as it sought to do in its proposed First Amended Complaint, to receive damages under the provisions of Section 26(b)(2), namely a sum equal to twice the consideration agreed to be given to the United States or any Governmental agency.

Thereupon the plaintiff United States of America withdrew its motion to file its First Amended Complaint, and on December 20, 1956, filed a Motion and Notice of Motion to File Second Amended Complaint. In this complaint the United States sought damages under the provisions of Section 26(b)(1) for \$2,000 liquidated [115] damages for each act. This Court allowed the filing of said Second Amended Complaint. In Paragraph VII V. of the Pretrial Conference Order, it is recorded that the plaintiff contends that it is entitled to double the amount of the sales price of the vehicles described in

the Second Amended Complaint, namely twice the sum of \$13,671.02 for Count One, twice the sum of \$38,131.13 for Count Two, and twice the sum of \$27,710.51 for Count Three; that plaintiff contended that it is entitled to make its election at any time prior to judgment; and that plaintiff elects, in the event of judgment in its favor, to receive as liquidated damages a sum equal to twice the consideration agreed to be given to the United States or federal agency involved.

This Court rules that the plaintiff United States can only receive liquidated damages under the provisions of Section 26(b) (2) if it elects to receive only such damages originally in the action; that since the United States sought damages under the provisions of Section 26(b)(1) in the original complaint, that such is an irrevocable election; that the plaintiff United States cannot thereafter amend its complaint to seek liquidated damages under the provisions of Section 26(b)(2), or otherwise elect to receive liquidated damages under the provisions of Section 26(b) (2), but that the United States is thereafter limited as the measure of its recovery for liquidated damages to those liquidated damages set forth in Section 26(b)(1).

#### IV.

This action is not barred by any Statute of Limitations or other limitation upon the time within which it may be brought, including but not limited to such provisions as contained in Title 28,

Section 2462, Title 18, Section 3287, or Presidential Proclamation 2714 (12 F.R.). The original complaint was timely filed. [116]

#### V.

The causes of action set forth in the Second Amended Complaint are not so foreign or different from those pleaded in the original complaint as to constitute separate and distinct causes of action. The filing of the original complaint thus operated to toll the Statute of Limitations; and the Second Amended Complaint was properly and timely filed, and is not barred by any Statute of Limitations or other limitation upon the time within which it must be filed.

#### VI.

Plaintiff is entitled to a judgment against the defendants as follows:

1. Against E. B. Hougham and Owen Dailey, jointly and severally, upon the First Count, for liquidated damages in the sum of \$2,000 for one act under the provisions of Section 26(b) of the Surplus Property Act of 1944, 50 U.S.C. App. 1635(b), repealed and re-enacted as Section 209(b) of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 239(b), and renumbered as 40 U.S.C. 489 (b).

2. Against E. B. Hougham and William E. Schwartze, jointly and severally, upon the Second Count, for liquidated damages in the sum of \$2,000,

for one act under the provisions of Section 26(b) of the Surplus Property Act of 1944, 50 U.S.C. App. 1635(b), repealed and re-enacted as Section 209(b) of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 239(b), and renumbered as 40 U.S.C. 489(b).

3. Against E. B. Hougham and Harlan L. McFarland, jointly and severally, upon the Third Count, for liquidated damages in the sum of \$2,000 for each act, for two acts under the provisions of Section 26(b) of the Surplus Property Act of 1944, 50 U.S.C. App. 1635(b), repealed and re-enacted and Section 209(b) of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. [117] 239(b), for a total of \$4,000.

4. For interest upon said sums from the date of judgment to the date of payment at the rate of 7% per annum.

5. For costs of suit.

In accordance with the foregoing Findings of Fact, and Conclusions of Law, it is Ordered, Adjudged and Decreed in the following:

#### Judgment

Plaintiff shall recover and hereby is awarded judgment against the defendants as follows:

1. Against E. B. Hougham and Owen Dailey, jointly and severally, for liquidated damages in the sum of \$2,000.00.

2. Against E. B. Hougham and William E. Schwartz, jointly and severally, for liquidated damages in the sum of \$2,000.00.

3. Against E. B. Hougham and Harlan L. McFarland, jointly and severally, for liquidated damages in the sum of \$4,000.00.

4. For interest upon said sums from the date of judgment to the date of payment at the rate of 7% per annum.

5. For costs of suit in the sum of \$.....

Dated: October 16th, 1957.

/s/ GILBERT H. JERTBERG,

United States District Judge.

Presented by:

LAUGHLIN E. WATERS,  
United States Attorney;

RICHARD A. LAVINE,  
Assistant U. S. Attorney,  
Chief of Civil Division;

/s/ RICHARD A. LAVINE,  
Assistant U. S. Attorney.

Lodged October 9, 1957.

[Endorsed]: Filed October 16, 1957.

Entered October 18, 1957, [118]

[Title of District Court and Cause.]

**NOTICE OF APPEAL**

Comes now the plaintiff United States of America and appeals to the Court of Appeals for the Ninth Circuit from the judgment in the above-entitled action, entered October 18, 1957, in the parts as follows:

1. From Paragraph VII B of the Pretrial Order filed September 3, 1957, insofar as same is incorporated into the judgment, or said judgment is based thereon;
2. From the Findings of Fact, Paragraphs IV, VIII and XII, filed October 16, 1957, insofar as same are incorporated into the judgment, or said judgment is based thereon;
3. From the Conclusions of Law, Paragraphs III and VI, insofar as same are incorporated into the judgment, or said judgment is based thereon;
4. From the Judgment, paragraphs 1, 2 and 3 insofar as [120] the same incorporates or is based upon the foregoing portions of the Pretrial Order, Findings of Fact and Conclusions of Law.

Dated: December 13, 1957.

**LAUGHLIN E. WATERS,**  
United States Attorney;

**RICHARD A. LAVINE,**

Assistant U. S. Attorney,  
Chief of Civil Division;

/s/ **RICHARD A. LAVINE,**

Assistant U. S. Attorney, Attorneys for Plaintiff,  
United States of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 13, 1957. [121]

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Defendants E. B. Hougham, Owen Dailey, William E. Schwartz and Harlan L. McFarland hereby appeal to the Court of Appeals for the Ninth Circuit from the final judgment and the whole thereof entered in this action on the 16th day of October, 1957, in favor of the plaintiff, the United States of America, and against the defendants, E. B. Hougham, Owen Dailey, William E. Schwartz and Harlan L. McFarland, and each of them, insofar as said judgment affects said defendants respectively.

Dated: December 11, 1957.

**CONRON, HEARD & JAMES,**

By /s/ **CALVIN H. CONRON, JR.,**  
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 14, 1957. [123]

In the United States District Court, Southern  
District of California, Northern Division

No. 1423-ND Civil

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**vs.**

**E. B. HOUGHAM**, Individually and Doing Business as Baker's Motor Market; **OWEN DAILEY**; **WILLIAM E. SCHWARTZE**, and **HARLAN L. McFARLAND**,

**Defendants.**

Honorable Gilbert H. Jertberg, Judge Presiding.

**REPORTER'S TRANSCRIPT OF  
PROCEEDINGS**

September 24, 1957

**Appearances of Counsel:**

**For the Plaintiff:**

**LAUGHLIN E. WATERS**,  
United States Attorney, by  
**RICHARD A. LAVINE**,  
Assistant United States Attorney.

**For the Defendants:**

**CONRON, HEARD & JAMES**, by  
**CALVIN H. CONRON, JR.**,  
**WAYNE M. HAMILTON**, and  
**WALDO R. BERGMAN**.

Tuesday, September 24, 1957—11:00 A.M.

Mr. Conron: May it please the Court, for the record at this time I would like to associate my associates Mr. Hamilton and Mr. Waldo Bergman, from Bakersfield.

The Court: The motion is granted, Mr. Bergman and Mr. Hamilton will be associated as attorneys of record in the case.

Now, gentlemen, what is the situation concerning jury trial in this case?

Mr. Conron: I didn't hear the question.

The Court: What is the situation concerning your demand for jury trial?

Mr. Conron: I would like at this time, if the Court please, to waive jury, on behalf of all defendants.

Mr. Lavine: The government has no objection to such waiver.

The Court: Very well, the Court will order the case be tried before the Court without a jury.

Can counsel give any indication as to the probable length of the trial?

Mr. Lavine: I believe, your Honor, the case will take two to three days time.

The Court: All right, I think we have this week set aside for it.

Mr. Conron: My judgment at this time is that three days [3\*] will be ample, probably only two.

The Court: Very well. All right, Mr. Lavine.

Mr. Lavine: Your Honor, I believe that the

\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

issues have been discussed sufficiently in the memoranda of the plaintiff to allow waiver of opening statement. I ask the Court's permission to do the following: We have extensive documentary material here, as you will note from the pretrial order. The defendants have waived the foundation on most, virtually all of the documentary evidence. Nevertheless the documentary evidence is rather complex for the Court or counsel to understand, so I would like the privilege, as I introduce the evidence, of merely pointing out certain portions of that evidence, directing your Honor's attention to it, and making the cross reference to other documentary evidence which will be used later on, so that the record may be complete and your Honor may be able to make appropriate notations.

The Court: Very well. I think it is very important that the Court understand these documents and the relevancy of them, and the purpose of counsel in connection with them.

Mr. Lavine: I would also like to ask the Court for permission to stand at the counsel table, where the documents are spread out.

The Court: Very well.

Mr. Lavine: Now, I have not submitted to the Clerk all of the documents for marking. There is a reference to the [4] proposed markings in the pretrial order, but for reasons of convenience I suggest the Clerk here mark them as we go along, the numbers will work out in the long run in sequence.

The Court: Yes, all right.

Mr. Lavine: Your Honor, for the convenience of

the Clerk, and the Court, I have appended to each of the documents the exhibit number in my own handwriting, and will refer to it—to that number in presenting it to the clerk.

First of all, your Honor, I offer into evidence Exhibit No. 1, which consists of veteran's application of Owen N. Dailey. And may I say, your Honor, for the first 75 exhibits, they will apply only to the first cause of action, that is against Owen Dailey and Mr. Hougham, and not to the other defendants in this action.

Exhibit No. 1 refers to a veteran's application No. V10 A 55767. To this are appended and referred to the application a statement by interviewer date 7-30-46, and signed by E. Vaneh, and further appended is a letter from the Bank of America, dated July 30, 1946, to the War Assets Administration, and signed by H. F. Hogan, vice-president and manager of said branch.

The Court: Now, as I understand the foundation has been waived?

Mr. Conron: Unless I raise objection, they may be stipulated into evidence. [5]

The Court: The three documents will then be as one exhibit?

Mr. Lavine: That is correct, your Honor.

The Court: All right, that will be marked by the Clerk then as Exhibit 1, Plaintiff's Exhibit No. 1.

(The documents referred to were marked as Plaintiff's Exhibit 1, and were received in evidence.)

PLAINTIFF'S EXHIBIT No. 1

(63 Partially issued—see below.) [In pencil at top of page.]

VETERAN'S APPLICATION FOR SURPLUS PROPERTY

Case No.: V-10-A-55,767.

Date Approved: 7/29/46.

1. Applicant: Dailey, Owen N.
2. Mailing Address: 2328 Chester Ave., Bakersfield, Kern County, Calif.  
Telephone Number: 66477.
3. Have you ever before filed an application to purchase surplus property, or has an application ever been filed by anyone for this enterprise? No.
4. Name of enterprise: Owen N. Dailey.  
2328 Chester Ave., Bakersfield, Kern County, Calif.
5. (a) Type of enterprise: Wholesaler, Retailer.  
(b) Legal form of enterprise: Individual.  
(c) Purpose for which items are to be used: Initial stock for resale to establish business. Initial stock for resale to maintain business.  
(d) Description or nature of business: Truck & Automotive Sales.
6. Is enterprise already established? Yes.  
If "Yes," are you now operating it? Yes.  
Number of employees: 1.
7. Name and address of all persons who are financially interested in this enterprise: Self.
8. Items wanted: [ \*Marked 63 issued in pencil.]

| Quantity                            | Unit of Measure | Description of Items Wanted               | Type of Use (Check One)<br>Personal Business Use | Do You Want to Inspect Before Buying | How Far Are You Willing To Travel   | Latest Date On Which You Would Accept Item |
|-------------------------------------|-----------------|---|--|--------------------------------------|-------------------------------------|--|
| 1                                   | CA              | Jeep .....                                | <input checked="" type="checkbox"/>              |                                      |                                     |  |
| 15-tons                             |                 | C-1 Tires..                               | <input checked="" type="checkbox"/>              | Yes                                  | Any                                 | 2-1-47                                     |
| 50-tons                             | 600x16          | Tires .....                               | <input checked="" type="checkbox"/>              | <input checked="" type="checkbox"/>  | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/>        |
| 50-tons                             | 650x16          | <input checked="" type="checkbox"/> ..... | <input checked="" type="checkbox"/>              | <input checked="" type="checkbox"/>  | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/>        |
| 50-tons                             | 700x16          | <input checked="" type="checkbox"/> ..... | <input checked="" type="checkbox"/>              | <input checked="" type="checkbox"/>  | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/>        |
| 50-tons                             | 750x16          | <input checked="" type="checkbox"/> ..... | <input checked="" type="checkbox"/>              | <input checked="" type="checkbox"/>  | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/>        |
| 50-tons                             | 600x16          | Tubea .....                               | <input checked="" type="checkbox"/>              | <input checked="" type="checkbox"/>  | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/>        |
| 50-tons                             | 650x16          | <input checked="" type="checkbox"/> ..... | <input checked="" type="checkbox"/>              | <input checked="" type="checkbox"/>  | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/>        |
| 50-tons                             | 700x16          | <input checked="" type="checkbox"/> ..... | <input checked="" type="checkbox"/>              | <input checked="" type="checkbox"/>  | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/>        |
| 50-tons                             | 750x16          | <input checked="" type="checkbox"/> ..... | <input checked="" type="checkbox"/>              | <input checked="" type="checkbox"/>  | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/>        |
| \$5,000.00 motors & motor parts*..  |                 |   | <input checked="" type="checkbox"/>              | <input checked="" type="checkbox"/>  | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/>        |
| \$4,000.00 value—1/2-ton truck*.... |                 |   | <input checked="" type="checkbox"/>              | <input checked="" type="checkbox"/>  | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/>        |
| \$8,000.00 value—3/4-ton truck*.... |                 |   | <input checked="" type="checkbox"/>              | <input checked="" type="checkbox"/>  | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/>        |
| \$4,500.00 value—1 1/2-ton truck*.. |                 |   | <input checked="" type="checkbox"/>              | <input checked="" type="checkbox"/>  | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/>        |

\*63. Issued. [Appears in margin opposite last 4 items.]

HS 8-2-46.

9. Will you desire credit in the purchase of any of the items listed? No.
10. If any items are to be resold answer the following:
  - (a) Working capital invested or to be invested in this enterprise:
 

By Proprietors (show share of each): \$35,000.00  
—Personal fund, Bank of America.
  - (b) Anticipated value of annual sales: \$150,000.00.  
Anticipated normal inventory to be carried: \$25,000.00.  
Inventory turn-over (number of times per year): 6.
  - (c) How much store or warehouse space will be needed?  
1/2 square block.  
Already obtained? Yes.
  - (d) If licenses for this type of business have been obtained, give dates and license numbers: Applied for.
11. Branch of Service: Air Corps, U. S. Army.  
Serial Number 0-584310.  
Date of Discharge or release: June 27, 1946.

**12. Business use (Applies only to items for business use, shown under 8)**

I certify:

- (a) That I qualify for the purchase of surplus property as a veteran, having served in the active military or naval service, of the United States during World War II on or after September 16, 1940, and prior to its termination, and having been discharged or released therefrom under honorable conditions;
- (b) That the enterprise described herein is one of which more than fifty per cent of invested capital or net income thereof is owned by or accrues to me, or to other eligible veterans; or that I am required as a reasonable condition of my employment by others to own my own tools or equipment;
- (c) (I) That the property herein applied for is to be used in, or as part of the equipment of, the enterprise described herein and not for resale; or  
(II) That the property applied for is the initial stock, necessary to establish or maintain the enterprise described herein, to be resold with or without processing or fabrication in the regular course of business; or  
(III) That the property described herein consists of tools or equipment required to be owned by me as a condition of my employment by others;
- (d) That I am not purchasing the property described herein for the benefit of any other enterprise, dealer, broker, merchant, or other undisclosed partner or principal;
- (e) That I have not heretofore purchased any surplus property under my veteran's preference;
- (f) That all of the statements made in this application are true and complete to the best of my knowledge and belief, and are subject to the criminal penalties of section 45A of the U. S. Criminal Code.

Date: 7/30/46.

/s/ OWEN N. DAILEY,  
Signature of Applicant.

13. Personal Use: (Applies only to items for personal use, shown under 8)

I hereby certify that I served in the active military or naval services of the United States, on or after, September 16, 1940, and prior to the termination of the present war and was discharged or released therefrom under honorable conditions; that I have not previously been certified for the purchase of these items under veteran's preference; and that I am procuring the property listed in this application for my own personal use and not for resale.

Date: July 30, 1946.

/s/ OWEN N. DAILEY,

Signature of Applicant.

It is a Criminal offense, and a felony, to make a wilfully false statement or claim directly or by any trick or scheme, to any government agency, as to any matter within its jurisdiction. (Sec. 35, U. S. Criminal Code). Heavy civil penalties are also provided for the fraudulent obtaining of surplus property. (Surplus Property Act Sec. 26.)

14. Remarks: Previous sales of similiar equipment. License pending for sale of automobiles. 20 years experience in business. \$1,500,000.00 gross sales volume in 1941. (See attached statement & letter.)

/s/ E. VANEK,

Certifying Officer.

7/30/46.

**Statement by Interviewer:**

After thorough interviewing, the following facts became apparent. They make certification possible even tho the applicant has no extensive evidence on paper.

- 1). He is from Bakersfield and wishes to attend current sale. It would be a hardship on him to force

him to go home to assemble paper proof on his business.

2). His conversation shows a real working background in the automobile trade and honest attempt to establish a functioning business.

3). He has been informed by authorities that he cannot have a "dealer's license" until he has three vehicles to register which he cannot have until he is certified by UAA.

4). He has proper "place of business" which he described in detail.

5). He agrees to forward copy of "dealer's license" when it is received.

6). Letter from Bank of America is attached to substantiate his statements. This was the only "paper proof" that he could arrange in time for the sale.

7). Any other data necessary can be had by conversation with—

/s/ E. VANEK,  
Interviewer.

7/30/46.

**Bank of America  
National Trust and Savings Association.  
Day and Night Office**

**San Francisco 20, California.**

**July 30, 1946.**

**War Assets Administration,  
Veterans Preference Bureau,  
San Francisco, California.**

**Gentlemen:**

In reference to application of Owen N. Bailey, 2328 Chester Avenue, Bakersfield, California, for certification as a veteran dealer, I wish to advise you that in our opinion this veteran has ample financial responsibility for the purchase of necessary merchandise to maintain his business at the address listed above.

**Yours very truly,**

**/s/ H. F. HOGAN,**

**Vice President and Manager.**

**[Endorsed]: Filed September 24, 1957.**

---

**Mr. Lavine:** I understand the Court's ruling to be unless suitable objection is made by counsel for the defendants and your Honor so rules, my offer is not only for identification but also for evidence.

**The Court:** They will be received in evidence.

**Mr. Conron:** The record may so show.

Mr. Lavine: Exhibit No. 2 is a typewritten statement of Owen Dailey, dated May 9, 1947, which bears a portion in the handwriting of Owen N. Dailey, and purportedly signed by Owen N. Dailey.

May it be stipulated, counsel, that such is the signature of Owen N. Dailey?

Mr. Conron: So stipulated. There may be some I won't recognize and I will ask to see them.

(The document referred to was marked as Plaintiff's Exhibit 2, and was received in evidence.)

---

PLAINTIFF'S EXHIBIT No. 2

46-1303-1A6

May 9, 1947.

Bakersfield, California.

I, Owen N. Dailey, hereby make the following voluntary statement to Robert J. Emonts whom I know to be a Special Agent of the Federal Bureau of Investigation. No threats or promises have been used to cause me to make this statement and I realize that it may be used in a court of law.

I presently reside at 2120 Pacific Dr., Bakersfield, Cal., and am employed as manager of the Shopper's Guide, an advertising publication with offices located at 1230 Chester St., Bakersfield. I have known E. B. Hougham, owner of Baker's Motor Market, for a number of years and had considerable contact with him prior to World War II when I was employed in the capacity of District Representative for the

## Plaintiff's Exhibit No. 2—(Continued)

Firestone Tire and Rubber Co. in the Bakersfield territory. While I was still in the Army in June, 1946, Hougham offered me a proposition to go to work for him following my discharge from the Army, as manager of the Baker's Motor Market at a salary of \$400.00 per month plus a bonus at the end of each year. He also told me that he would like for me to eventually take over the business. Following my discharge from the Army I went to work for him on this basis on July 5, 1946. Shortly after this on July 29, 1946, I made application with the War Assets Administration for a veteran's priority to purchase automotive equipment as a dealer. The W.A.A. office in San Francisco where I made the application required that I have a California dealer's license which I had already applied for, and also that I have evidence that I could pay for the equipment and have a place to store it. I obtained a letter from the Day and Night Branch of the Bank of America in San Francisco signed by Mr. Hogan who had known of me while with the Bank of America in Bakersfield, vouching for my ability to pay for any equipment purchased and guaranteeing a storage place. As a result I was certified for the purchase of \$25,000 worth of equipment which I believe was subdivided into \$15,000 for trucks; \$5,000 for motors and parts; and \$5,000 for tires and tubes. All of this was for resale. At the same time I was certified for the purchase of a jeep for my personal use.

**Plaintiff's Exhibit No. 2—(Continued)**

Through the use of the above priority I purchased approximately twelve trucks, 100 trailers, and some new and used tires and tubes. The funds for the purchase of these items was entirely supplied by Baker's Motor Market to whom I executed bills of sale for each item as it was purchased. I was paid no extra compensation for obtaining these items on my priorities, since no distinction was made between these items and those obtained without a veteran's priority in the name of Baker's Motor Market except that it was necessary for me to execute bills of sale for those items obtained under my priority. I had no financial interest in the business of Baker's Motor Market and my relationship with E. B. Hougham was an employee—employer one. The idea of my obtaining equipment for Baker's Motor Market was not a direct proposition of Hougham's but the result of a discussion between him, his stepson Wm. Schwartze, also an employee of Baker's Motor Market, Harlan McFarland, operator of a used car and truck lot, and myself whereby we latter three being veteran's of World War II decided with Hougham's knowledge and approval to obtain California dealer's licenses and W.A.A. veteran's certifications in order to obtain the more select items at the W.A.A. sales which were normally available to veterans before the regular nonveteran dealers. Hougham agreed to put up the money to finance the purchases under any of our priorities. All of the items purchased under my priorities were paid for and disposed of by Baker's Motor Market of which

**Plaintiff's Exhibit No. 2—(Continued)**

I was the manager at the time. I later resigned my position there in February, 1947.

In addition to a considerable amount of trucks and equipment being obtained by Baker's Motor Market in the above manner, I recall one instance in Sept., 1946, when I made a trip to Port Hueneme, California to a W.A.A. sale with Schwartze, McFarland, and Floyd Thompson, then a mechanic for Baker's Motor Market and also a veteran of World War II.

While we were at the sale there was a long wait before we were able to get the items I had come for which I believe were a number of bomb carrying trailers. During this wait we struck up a conversation with Eugene Hochstedler, another veteran, also from Bakersfield. I had not known him before but he apparently knew me and explained that he would like to get a Dodge Carryall truck but didn't have enough money with him. I agreed to supply the money from Baker's Motor Market funds and told him that Baker's Motor Market would take the truck off his hands if he didn't want it. I obtained a cashier's check for him for the amount of the purchase price and I believe the truck was delivered direct to Baker's Motor Market along with other items that I purchased there that day. I do not recall Hochstedler being paid any additional amount for obtaining the truck for Baker's Motor Market. I also recall that on the same day an Oilfield International truck was obtained by Floyd Thompson for

Plaintiff's Exhibit No. 2—(Continued)

Baker's Motor Market and for which funds were supplied by me as representative of the Baker's Motor Market. I believe that I also obtained a cashier's check and gave it to Thompson with which he purchased the truck.

I wish to state that although there were no discussions between Hougham and myself about recruiting veterans so that their priorities might be used in obtaining W.A.A. equipment for Baker's Motor Market, I was acting with the full knowledge and consent of Hougham in supplying Baker's Motor Market funds for the above-mentioned purchases. I am not aware of any compensation paid to any of the above veterans for the use of their priorities but in every instance funds were supplied by Baker's Motor Market and the equipment was legally conveyed to Baker's Motor Market by the execution of individual bills of sale for each item. I know that Schwartze, McFarland and myself were licensed veteran dealers and obtained W.A.A. equipment for resale but I am not certain whether Hochstedler was a licensed veteran used car and truck dealer nor whether Floyd Thompson was although I doubt if Thompson was. One other individual who accompanied us to at least one of the sales and who purchased a couple of trucks which were later sold to Baker's Motor Market was Irvin Leming whom I know to be a licensed veteran used car and truck dealer and who supplied his own money for the purchase of the trucks which were later sold to Baker's

Plaintiff's Exhibit No. 2—(Continued)  
Motor Market. I know of no other veteran whose priorities were used either directly or indirectly to obtain W.A.A. priority items for Baker's Motor Market.

I have read the above statement consisting of this and one preceding page and everything contained therein is true and correct to the best of my knowledge and recollection.

/s/ OWEN N. DAILEY.

Subscribed and sworn to before me this 9th day of May, 1947.

/s/ ROBERT J. EMONTS,  
Special Agent, F.B.I.,  
Los Angeles.

Witnessed:

RICHARD J. BUXTON,  
Special Agent, F.B.I.,  
Bakersfield, Calif.

5/9/47.

[Endorsed]: Filed September 24, 1957.

---

Mr. Lavine: Will the Clerk call as plaintiff's first witness James J. Galbreath, spelled [6] G-a-l-b-r-e-a-t-h.

**JAMES J. GALBREATH**

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: James J. Galbreath.

The Clerk: Have that seat there.

**Direct Examination**

By Mr. Lavine:

Q. Mr. Galbreath, what is your occupation?

A. I am an archivist.

Q. And what is your present job?

A. I am the chief of the reference service branch of the Federal Records Center in South San Francisco.

Mr. Conron: Mr. Galbreath, will you speak a little louder, please.

The Witness: Yes.

The Court: I didn't hear, Mr. Galbreath, your occupation.

The Witness: I am an archivist.

The Court: Archivist?

The Witness: Yes.

The Court: That deals with archives?

The Witness: That is right.

The Court: All right.

Mr. Conron: Sounded like "architect."

The Court: I thought it was "artist" and I was looking [7] forward to a very interesting session with this witness.

Q. (By Mr. Lavine): Mr. Galbreath, what are the duties involved in your job, in brief?

(Testimony of James J. Galbreath.)

A. The Federal Records Center is a function of the National Archives and Records Service, which has custody of government records and makes them available to other government agencies and sometimes to the public.

Q. Do you keep, or have charge of government records as part of your duties? A. Yes.

Q. Which government records, if I may use that general term?

A. We have records of a great many government agencies, including some agencies which are now defunct, such as the War Assets Administration.

Q. I show you Plaintiff's Exhibit 3, which is denominated catalog 45324, and—

Mr. Lavine: Incidentally, your Honor, there is no stipulation in regard to this document.

Q. —and I ask you whether this document was received from your archives or records?

A. I have no record to show that it was.

Q. Do you have any record showing that you have similar or identical copies of this document in your official files? [8]

A. Yes, this is a War Assets Administration catalog for sale No. 45324. We have a copy of the War Assets Administration sales catalog 45324 at the Federal Records Center in container 15957.

Mr. Lavine: At this point, your Honor, I would like to offer myself as a witness on a purely foundational matter.

The Court: I assume you better be sworn then?

Mr. Lavine: Yes, your Honor.

**RICHARD A. LAVINE**

called as a witness for plaintiff, having been first duly sworn, was examined and testified as follows:

**Direct Examination**

**Mr. Lavine:** Your Honor, I ask for convenience, may I address the Court from standing up?

**The Court:** Yes.

**Mr. Lavine:** Your Honor, I at present am an Assistant United States Attorney, chief of the Civil Division of the U.S. Attorney's office in this district. As such I am in charge of the handling of the case at bar. Part of my duties consist of being in charge of the files and records concerning this case. I was not counsel for the government at the institution of the case, my predecessor Joseph Mullender was formerly the Assistant U.S. Attorney in charge of the case prior to the time I took over. At such time as I took over this case, among the files and records with such case [9] was catalog 45324, which copy I hold in my hand. I do not know of my own personal knowledge the source from which this catalog was derived. I have an opinion on that subject, which I will not express unless the Court asks me my opinion on that subject. Nevertheless, it is a document which I hold in my custody, as part of the official files in this case, and as such is considered to be a government document.

**The Court:** What is the catalog number?

**Mr. Lavine:** Catalog No. 45324.

**Mr. Conron:** May I cross-examine this witness, your Honor?

(Testimony of Richard A. Lavine.)

The Court: Yes.

**Cross-Examination**

By Mr. Conron:

Q. What is your opinion as to where it came from?

A. I believe that this catalog came from either one of two other sources. I believe it came from a Records Center other than the Records Center maintained by the witness now on the stand, Mr. Galbreath, either from the Records Center at San Pedro, or in the alternative, it must have been provided to our office directly by the Federal Bureau of Investigation, which, as the evidence later on will indicate, conducted some kind of an investigation of this case a number of years ago, probably in the year 1947. I do not have a record of the exact date when this material was transmitted to our office, and from which source it was transmitted. [10]

Mr. Conron: No further questions.

Mr. Lavine: I now offer Exhibit 3 in evidence, your Honor.

Mr. Conron: I have no objection to it being marked for identification, but I don't think the proper foundation has been laid for its use as evidence.

The Court: I was wondering, I was going to ask the witness, did you have an opportunity to compare the document that Mr. Lavine has handed to the Court, with the document bearing the same catalog

(Testimony of Richard A. Lavine.)

number that you say is in your custody, as part of the archives, and bearing the same catalog number?

Mr. Conron: Your Honor, I don't have that thought in mind. I will waive such comparison. It isn't the authenticity of the document. I have no question but what Mr. Lavine would not commence the offer if there was anything wrong. The point of my objection in reference to foundation is, this I assume is a catalog stating that on a certain day a certain sale will be held. That is not, to my mind, proof of sale.

The Court: Well, I certainly—I don't know, do you intend—

Mr. Conron: Or whether these articles were actually purchased under this. I don't think there is sufficient foundation. He may be able to prove that.

The Court: Well, are you introducing this document to [H] establish a sale was made pursuant to that document?

Mr. Lavine: Your Honor, there is considerable merit in the objection made on that limited ground. My intended course of offer of proof will be as follows: I intend to offer as a witness Carl F. Koenig, sitting at counsel table, who will testify that he had general knowledge and certain supervision of the sales at the time, and will identify and describe to your Honor what these catalogs were, how they were issued, and to whom they were distributed, and will also comment to your Honor on the use of such a manual.

Further, your Honor. I will attempt to link this

(Testimony of Richard A. Lavine.)

manual into the evidence by cross references to documents, the foundation to which I believe will be waived by counsel.

It is perfectly agreeable to the government at this time, if we receive it merely for identification, and seek to link it up later.

The Court: Very well. It will be marked then as Plaintiff's Exhibit 3 for identification.

(The catalog referred to was marked as Plaintiff's Exhibit 3 for identification.)

(The following questions were directed to the witness Galbreath, still on the witness stand:)

Q. (By Mr. Lavine): I show you Plaintiff's Exhibit 4, which consists of a sales catalog [12] 46069.

The Court: 46069.

Q. (By Mr. Lavine): Mr. Galbreath, I show you this document and ask you if at some time you had custody of this document?

A. Yes, this catalog came from the Federal Records Center.

Q. And was this document, and similar documents, kept by you in the official course of your duties? A. Yes.

Q. And what happened with this document, according to your knowledge of the records?

A. The United States Attorney requested that we send it to him.

Q. And that document is now in my temporary custody? A. Yes.

(Testimony of Richard A. Lavine.)

Mr. Lavine: I offer this Exhibit 4 for identification in evidence.

The Court: It will be marked Plaintiff's Exhibit 4 for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 4 for identification.)

Mr. Lavine: Your Honor, I offer next in evidence Plaintiff's Exhibit No. 5, which consists a Veterans' Preference Certificate, War Assets Administration, Form No. SF-63.

The Court: SF dash? [13]

Mr. Lavine: 63. For purposes of cross reference, your Honor, I suggest the Court and counsel may wish to refer to the first cause of action, transaction No. 5-H.

The Court: Just a minute, please.

Mr. Lavine: Certainly.

The Court: 5-H?

Mr. Lavine: Yes, your Honor. That consists of tag 2-361, sale number 5-71.

In this regard, your Honor, the reference is an indirect one by inference only. The exhibit which I hold in my hand refers to a certain number of trailers, orders for which were filled on 9-17-46, some 25 trailers billed 9-17-46. The only relevancy of this document to that particular transaction is if the Court draws the inference that the 25 items, tag 2361 is in fact one of the trailers derived as set forth in the document. No other relevancy is sought for this piece of evidence.

(Testimony of Richard A. Lavine.)

Mr. Conron: That may be admitted into evidence.

The Court: Very well. That will be Plaintiff's Exhibit 5.

(The document referred to was marked as Plaintiff's Exhibit 5, and was received in evidence.)

Q. (By Mr. Lavine): Mr. Galbreath, I show you Plaintiff's Exhibit 6 for identification, consisting of catalog 45968, and ask you whether this document was at some past a part of your records? [14]

A. Yes, it was.

Q. Was it maintained by you as part of your official duties? A. Yes.

Q. And what happened to this catalog?

A. The United States Attorney requested us to send it to him.

Mr. Conron: It may be marked for identification.

Mr. Lavine: I offer this for identification, your Honor.

The Court: All right, No. 6 for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 6, for identification.)

The Court: I assume, Mr. Galbreath, when you say the United States Attorney you are referring to Mr. Laughlin Waters, United States Attorney for the Southern District?

The Witness: That is correct.

Q. (By Mr. Lavine): Mr. Galbreath, I show you Plaintiff's Exhibit No. 7, catalog 45934, and ask

(Testimony of Richard A. Lavine.)

you whether this document was part of your official records?

A. May I take a moment to look at this more closely?

Q. Please do. A. Yes, it was.

Q. And what happened to this document?

A. We also sent that to Mr. Laughlin [15] Waters.

Mr. Lavine: I offer it for identification, your Honor.

The Court: It will be Plaintiff's Exhibit 7 for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 7, for identification.)

Mr. Lavine: Next, your Honor, I am going to refer to a number of exhibits without the use of this witness, so may I suggest that we take them up seriatim, leaving this witness on the stand?

I next offer into evidence Exhibit No. 8. Exhibit No. 8 refers in the first cause of action to the first transaction, No. 1. The document will to sale No. 45324, in catalog 45324, same number as I just read. For cross reference I suggest you refer to tag 5235.

By interpolation, your Honor, I suggest when I refer to a sale number and to a catalog number, later on I will link this into the evidence, your Honor and opposing counsel may look at the documents contained therein and refer to the sale numbers and also the item will bear a tag number, like in this case, tag 5235.

(Testimony of Richard A. Lavine.)

The Court: Just let me find that tag number.

Mr. Lavine: In this particular case the tag appears as the last item on transaction No. 1, the very first item in the long series of items in the first cause of action, paragraph VII, Arabic 2.

For the convenience of the Court I further suggest that [16] any of these items may be checked as follows: knowing the catalog number and the tag number, in most instances one refers to the catalog, finds the tag number, and that will show the relation between the catalog and the tag number of the item.

In certain cases, which I will later refer to, we will find it in the catalog perhaps not by tag number but by serial number, in which case I will make the appropriate reference to the Court, but unless I do so, the item may be found in the respective catalogs by the use of the tag numbers.

The Court: I must confess I haven't been able to find the tag number.

Mr. Conron: On page 4, line 7, it describes a truck, engine number, and tag.

The Court: Oh, yes, I finally found it.

Mr. Lavine: At some later time, by the next witness, your Honor, I will offer the Court a description of what these documents are that I am offering in evidence.

Nevertheless, I wish to call the attention of the Court to certain significant items which may be found in each exhibit as the documents are presented. One significant item, your Honor, will be the purchase authority number, which in this case, and

(Testimony of Richard A. Lavine.)

I read from this document Exhibit 8, V-10-A-55767.

The significance of that item will be referred [17] to by a later witness.

Further, your Honor, in most instances, with certain exceptions which we will take up as we go along, one of the items in these various exhibits, which in fact consists of sales folders for each of the transactions, one of the copies in most instances will bear a stamped portion on the rear of one of the documents, which bears the title "Veterans Preference" and I read:

"The contracting officer whose signature appears below certified that this contract is awarded to a veteran exercising preference rights in accordance with Surplus Property Administration Regulation 7. The purchaser agrees to buy the property listed herein in accordance with the attached sales conditions and any modifications thereof which are attached to and made a part hereof."

Now, this particular portion which I read from in Exhibit 8 is signed by Owen N. Dailey, and I believe counsel has stipulated such is the signature of Mr. Dailey in the instances which I will cite.

Mr. Conron: So stipulate.

Mr. Lavine: I offer this into evidence.

The Court: It will be received and marked Plaintiff's Exhibit 8.

(The document referred to was marked as Plaintiff's Exhibit No. 8, and was received in evidence.) [18]

(Testimony of Richard A. Lavine.)

Mr. Lavine: Next I offer Exhibit No. 9, the reference of which is to transaction No. 2. You may follow it, your Honor, right in line on page 4.

The Court: Yes, I have it.

Mr. Lavine: Sale reference will be 45324, and the tag number will be 1702. I offer that.

The Court: It will be received and marked Plaintiff's Exhibit No. 9.

(The document referred to was marked as Plaintiff's Exhibit No. 9 and was received in evidence.)

Mr. Lavine: I offer as No. 10, your Honor, also sales folder, referred to in first cause of action, transaction 3-A, sales reference 45324, tag 4244. It likewise, your Honor, bears the certificate by Owen Dailey referred to previously.

I wish to refer back to No. 9, your Honor, the previous one I referred to. It likewise bears the certificate of Owen Dailey as does No. 10, the item I just offered, your Honor: May that be received, your Honor?

The Court: It will be received as Plaintiff's Exhibit 10.

(The document referred to was marked as Plaintiff's Exhibit No. 10, and was received in evidence.)

Mr. Lavine: I offer as No. 11 sales folder, reference to which is first cause of action, transaction 3-B, reference of sale 45324, tag 4243. It likewise

(Testimony of Richard A. Lavine.)

bears the certificate [19] of Dailey. Does your Honor wish me to continue?

The Court: Yes. That will be received as Plaintiff's Exhibit 11.

(The document referred to was marked as Plaintiff's Exhibit No. 11, and was received in evidence.)

Mr. Lavine: No. 12, sales folder, first cause of action No. 3-C, sale 45324, tag 4228; it contains a certificate.

Mr. Conron: You are going right down the line?

Mr. Lavine: Yes. No. 13—

The Court: It will be received and marked Plaintiff's Exhibit 12.

(The document referred to was marked as Plaintiff's Exhibit No. 12, and was received in evidence.)

Mr. Lavine: Sorry, your Honor. No. 13, first cause of action, No. 3-D, sale 45324, tag 4241; certificate of Dailey.

The Court: It will be received and marked Plaintiff's Exhibit 13.

(The document referred to was marked as Plaintiff's Exhibit No. 13, and was received in evidence.)

Mr. Lavine: 14, first cause of action, No. 3-E, sale 45324, tag 4245.

The Court: It will be received and marked Plaintiff's Exhibit 14.

(Testimony of Richard A. Lavine.)

**Mr. Conron:** It may be admitted. [20]

(The document referred to was marked as Plaintiff's Exhibit No. 14, and was received in evidence.)

**Mr. Lavine:** Likewise it contains the certificate of Dailey.

No. 15 of plaintiff, your Honor, first cause of action No. 3-F, sale 45324, tag 4247.

**The Court:** It will be received and marked 15.

(The document referred to was marked as Plaintiff's Exhibit No. 15, and was received in evidence.)

**Mr. Lavine:** Containing a certificate. As Plaintiff's No. 16, we offer folder for transaction 3-G, for first cause of action, sale 45324, tag 4246; it contains the certificate.

**The Court:** It will be received and marked Exhibit 16.

(The document referred to was marked as Plaintiff's Exhibit No. 16, and was received in evidence.)

**Mr. Lavine:** As No. 17, we offer, first cause of action 3-H, sale 45324, tag 4226, with a certificate.

**The Court:** It will be received and marked 17 in evidence.

(The document referred to was marked as Plaintiff's Exhibit No. 17 and was received in evidence.)

(Testimony of Richard A. Lavine.)

Mr. Lavine: No. 18, first cause of action No. 3-I, sale 45324, tag 4230, certificate of Dailey.

The Court: It will be received and marked Exhibit 18.

(The document referred to was marked as Plaintiff's Exhibit No. 18 and was received in evidence.) [21]

Mr. Lavine: No. 19, first cause of action No. 3-J, sale 45324, tag 4229, with certificate.

The Court: It will be received and so marked.

(The document referred to was marked as Plaintiff's Exhibit No. 19, and was received in evidence.)

Mr. Lavine: No. 20, first cause of action 3-K, sale 45324, tag 4227, with certificate.

The Court: It will be marked Exhibit 20.

(The document referred to was marked as Plaintiff's Exhibit No. 20, and was received in evidence.)

Mr. Lavine: No. 21, No. 3-L first cause of action, sale 45324, tag 4224, with certificate.

The Court: It will be received and marked 21 in evidence.

(The document referred to was marked as Plaintiff's Exhibit No. 21, and was received in evidence.)

Mr. Lavine: No. 22, first cause of action No. 3-M, sales 45324, tag 4223, with certificate.

(Testimony of Richard A. Lavine.)

The Court: It will be received and marked 22 in evidence.

(The document referred to was marked as Plaintiff's Exhibit No. 22, and was received in evidence.)

Mr. Lavine: No. 23, first cause of action No. 3-N, sale 45324, tag 4222, with certificate.

The Court: It will be received and so marked, 23 in evidence.

(The document referred to was marked as Plaintiff's Exhibit No. 23, and was received in evidence.) [23]

Mr. Lavine: Exhibit No. 24, first cause of action No. 4-A, sale 45324, tag 2240, with certificate.

The Court: Just a minute, 2240? Is that right?

Mr. Lavine: 2240, your Honor.

The Court: Yes, it will be marked Plaintiff's Exhibit 24.

(The document referred to was marked as Plaintiff's Exhibit No. 24, and was received in evidence.)

Mr. Lavine: No. 25, your Honor, of the first cause of action No. 4-B, sale 45324, tag 2237, with certificate.

The Court: It will be marked Exhibit 25 in evidence.

(The document referred to was marked as Plaintiff's Exhibit No. 25, and was received in evidence.)

(Testimony of Richard A. Lavine.)

Mr. Lavine: As 26, your Honor, I offer, first cause of action No. 4-C, sale 45324, tag 2239, with certificate.

The Court: It will be marked Exhibit 26 in evidence.

(The document referred to was marked as Plaintiff's Exhibit No. 26, and was received in evidence.)

Mr. Lavine: As 27, first cause of action No. 4-D, sale 45324, tag 2230, with certificate.

The Court: It will be marked Exhibit 27.

(The document referred to was marked as Plaintiff's Exhibit No. 27, and was received in evidence.)

Mr. Lavine: As No. 28, your Honor, first cause of action No. 4-E, sale 45324, tag 2229, with certificate.

The Court: It will be received and marked Exhibit 28. [24]

(The document referred to was marked as Plaintiff's Exhibit No. 28, and was received in evidence.)

Mr. Lavine: No. 24, offer number one, first cause of action No. 4-F, sale 45324, tag 2226, with certificate.

The Court: It will be marked Exhibit 29.

(The document referred to was marked as Plaintiff's Exhibit No. 29, and was received in evidence.)

(Testimony of Richard A. Lavine.)

Mr. Lavine: No. 30, first cause of action, No. 4-G, sale 45324, tag 2225, with certificate.

The Court: It will be marked Exhibit 30 in evidence.

(The document referred to was marked as Plaintiff's Exhibit No. 30, and was received in evidence.)

Mr. Lavine: As No. 31, first cause of action, No. 4-H, sale 45324, tag 2228, with certificate.

The Court: It will be received and marked Exhibit 31.

(The document referred to was marked as Plaintiff's Exhibit No. 31, and was received in evidence.)

Mr. Lavine: As No. 32, I offer, first cause of action No. 4-1, sale 45324, tag 2227, with certificate.

The Court: It will be marked Exhibit 32.

(The document referred to was marked as Plaintiff's Exhibit No. 32, and was received in evidence.)

Mr. Lavine: As No. 33, your Honor, we offer, first cause of action, No. 5-A, sale 45324, tag 2352, with certificate.

The Court: Received and marked Exhibit 33.

(The document referred to was marked as Plaintiff's Exhibit No. 33, and was received in evidence.)

(Testimony of Richard A. Lavine.)

Mr. Lavine: As 34, I offer for the first cause of action No. 5-B, sale 45324, tag 2354, with certificate.

The Court: That will be marked Exhibit 34.

(The document referred to was marked as Plaintiff's Exhibit No. 34, and was received in evidence.)

Mr. Lavine: As 35, the first cause of action No. 5-C, sale 45324, tag 2351, with certificate.

The Court: That will be marked Exhibit No. 35.

(The document referred to was marked as Plaintiff's Exhibit No. 35, and was received in evidence.)

Mr. Lavine: No. 36, first cause of action 5-D, sale 45324, tag 2350, with certificate.

The Court: That will be Exhibit 36.

(The document referred to was marked as Plaintiff's Exhibit No. 36, and was received in evidence.)

Mr. Lavine: No. 37, first cause of action No. 5-E, sale 45324, tag 2349, with certificate.

The Court: Exhibit 37.

(The document referred to was marked as Plaintiff's Exhibit No. 37, and was received in evidence.)

Mr. Lavine: No. 38, first cause of action No. 5-F, sale 45324, tag 2347, with certificate.

The Court: It will be received and marked Exhibit 38 in evidence. [26]

(Testimony of Richard A. Lavine.)

(The document referred to was marked as Plaintiff's Exhibit No. 38, and was received in evidence.)

Mr. Lavine: No. 39, your Honor, first cause of action No. 5-G, sale 45324, tag 2362, with certificate.

The Court: It will be marked Exhibit 39.

(The document referred to was marked as Plaintiff's Exhibit No. 39, and was received in evidence.)

Mr. Lavine: As No. 40, first cause of action No. 5-H, sale 45324, tag 2361, with certificate.

The Court: Now, that is the one that also ties into Exhibit 5, is that right?

Mr. Lavine: Correct, your Honor.

The Court: That will be Exhibit 40.

(The document referred to was marked as Plaintiff's Exhibit No. 40, and was received in evidence.)

Mr. Lavine: As 41, first cause of action, No. 5-I, sale 45324, tag 2360, with certificate.

The Court: It will be Exhibit 41.

(The document referred to was marked as Plaintiff's Exhibit No. 41, and was received in evidence.)

Mr. Lavine: As 42, first cause of action No. 5-J, sale 45324, tag 2363, with certificate.

The Court: That will be Exhibit 42.

(The document referred to was marked as Plaintiff's Exhibit No. 42, and was received in evidence.) [27]

(Testimony of Richard A. Lavine.)

Mr. Lavine: As No. 43, your Honor, first cause of action No. 5-K, sale 45324, tag 2364, with certificate.

The Court: That will be Exhibit 43.

(The document referred to was marked as Plaintiff's Exhibit No. 43, and was received in evidence.)

Mr. Lavine: No. 44, first cause of action No. 6-A, sale 45324, tag 4666. On that, your Honor, there is no signed certificate by Owen Dailey.

The Court: Let's see. That was tag 4666.

Mr. Lavine: Yes, it refers to sale 45324.

The Court: Was that the first one that has no certificate?

Mr. Lavine: That is the first one on which I have found no certificate, your Honor.

The Court: That will be received as Exhibit 44.

(The document referred to was marked as Plaintiff's Exhibit No. 44, and was received in evidence.)

Mr. Lavine: As No. 45, No. 6-B, sale 45324, tag 4664; no signed certificate.

The Court: No signed.

(The document referred to was marked as Plaintiff's Exhibit No. 45, and was received in evidence.)

Mr. Lavine: As No. 46, you Honor—

Mr. Conron: Mr. Lavine, let's go down through

(Testimony of Richard A. Lavine.)

B, C, through X, they all apparently are the same type of items. Is there any necessity for taking them individually. I don't [28] mean to interrupt your trend of thought.

Mr. Lavine: Thank you for the suggestion, Mr. Conron.

Mr. Conron: They are all the same, they are purchases of identical types of articles.

Mr. Lavine: Let me offer then as 46 through—one moment please—as 43 through 67—

The Court: Wait a minute. 43?

Mr. Lavine: Excuse me, your Honor. 46 through 67 respectively, items Nos. 6-C to 6-X. In all cases the sales number is 45324, and the tag number is as it appears in the pleadings in the first cause of action.

Now, before passing them to the Clerk, I would like to quickly look through each to find which ones, if any, do not contain the certificate, and read those numbers to the Court.

The Court: Now, don't do it too fast. I am not a shorthand writer.

Mr. Conron: Mr. Lavine, it is a sale on a different day and a different place.

Mr. Lavine: I will seek to link the transactions to certain sales by means of the catalogs, and the certificate, without a special certificate by the veteran. Let me rapidly go through these.,

The Court: Let me, just so I have my record straight, that would include exhibits 46 through 67?

Mr. Lavine: That is correct, your Honor. [29]

(Testimony of Richard A. Lavine.)

(The documents referred to were marked as Plaintiff's Exhibits 46 through 67 respectively, and received in evidence.)

Mr. Lavine: Let me read to your Honor the instances in which there will be no special certificate on the back of one of these sale documents executed by Mr. Dailey. None for 46. None for 47; none for 48; none for 49; none for 50; none for 51; none for 52; none for 53; none for 54.

The Court: You should have started the other way.

Mr. Lavine: None for 55, your Honor; none for 56; none for 57; none for 58; none for 59; none for 60; none for 61; none for 62; none for 63; none for 64; none for 65; none for 66 and none for 67.

The Court: Well, in other words, there is no certificate in 46 to 67.

Mr. Lavine: No certificate of the type of which I previously described.

The Court: Yes.

Mr. Conron: That was a sale on a different day of a different article.

The Court: Gentlemen, I think we will take our noon recess at this time. We will return at 2:00 o'clock.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [30]

(Testimony of Richard A. Lavine.)

Afternoon Session—2:00 P.M.

The Court: Mr. Lavine.

Mr. Lavine: Your Honor, I believe the last exhibit I offered was Exhibit 67. In the exhibits which I am now about to offer, certain other ones, there may not be in all cases a tag number written in the pleadings which your Honor is following. In case case I will give you the tag number, so it can be correlated with the sales documents. The reason why it is important to know the tag number is because that is the easiest way of finding it in the catalog. In the case of the items set forth in the pleadings where no tag has been given, the items in the pleadings may be identified by comparing the engine number or serial number with the sales document, and from that verifying the fact that the sales document refers to the transaction in the pleadings. That is one step more if I haven't the tag number already down.

I offer next item No. 68, Exhibit 68, which refers to the first cause of action, transaction No. 7, tag 2033, catalog and sales is 45324, and the certificate of Dailey is within.

The Court: Just a minute. That would be Exhibit 68. What is the tag number?

Mr. Lavine: 2033. [31]

The Court: And the catalog number?

Mr. Lavine: 45324, the same as the ones previously discussed in sale 6, which ran from A to X.

(Testimony of Richard A. Lavine.)

(The document referred to was marked as Plaintiff's Exhibit No. 68, and was received in evidence.)

Mr. Lavine: Now, 69, first cause of action No. 8.

The Court: Did we get 68 marked?

The Clerk: Yes.

The Court: All right.

Mr. Lavine: First cause of action, No. 8, the tag number is 1997, catalog number, sales number is 45783.

Now, I may say there is no catalog available to us at the present time to correlate this particular transaction. However, there is the conventional certificate of Dailey within, in addition to which there is a special certificate by Owen N. Dailey, apparently with his signature, to the Veterans Administration, stating that he desires to purchase said vehicle by use of his Veterans Preference Certificate V-10-A-55767, which is Exhibit 1, I believe.

The Court: That will be Exhibit 69.

(The document referred to was marked as Plaintiff's Exhibit No. 69, and was received in evidence.)

Mr. Lavine: Next, Exhibit No. 70, first cause of action, sale No. 9, tag 604, refers to sale in catalog 45783. Likewise, on this there is no sales catalog presently available. [32] However, within there is the conventional certificate by Mr. Dailey, together with a letter to the War Assets Administration

(Testimony of Richard A. Lavine.)

signed by Mr. Dailey, referring to Veterans Preference Certificate attached.

The Court: That will be Exhibit 70.

(The document referred to was marked as Plaintiff's Exhibit No. 70, and was received in evidence.)

Mr. Lavine: I next offer as Exhibit 71, first cause of action, Transaction No. 10, tag 890, that is sale—

Mr. Conron: You can eliminate that. We admit that purchase in the pleadings, that is the jeep.

Mr. Lavine: Right.

Mr. Conron: Put it in if you like.

Mr. Lavine: I will put it in just for identification now, without offering it in evidence.

The Court: Well, we will put it in evidence. It will be Exhibit 71.

(The document referred to was marked as Plaintiff's Exhibit No. 71; and was received in evidence.)

Mr. Lavine: As No. 72, first cause of action, Sale No. 11, referring to catalog 45954, tag 795, and there apparently is no certificate by Mr. Dailey.

The Court: That will be marked Exhibit 72.

(The document referred to was marked as Plaintiff's Exhibit No. 72, and was received in evidence.) [33]

Mr. Lavine: No. 73, first cause of action No. 12, the catalog number on this is 45954, tag 988. There is no certificate within. However, we refer to item

(Testimony of Richard A. Lavine.)

12, that would be Exhibit No. 71, which apparently has a certificate which also refers to the tag or the item number in this Exhibit 73.

The Court: It will be received as Exhibit 73.

(The document referred to was marked as Plaintiff's Exhibit No. 73, and received in evidence.)

Mr. Lavine: No. 74, sale No. 13 in the first cause of action, tag 2849, sale 45954.

The Court: Catalog?

Mr. Lavine: That is the catalog number, yes, your Honor. For the certificate therein is an unconventional certificate, but nevertheless there is a letter to the War Assets Administration, signed apparently by Owen N. Dailey, requesting several items, in which Mr. Dailey states among other things he attaches his Veterans Preference Certificate.

The Court: You dropped your voice. I don't know whether the reporter got it. I didn't anyway.

(Record read.)

Mr. Lavine: That was 74, your Honor.

The Court: Yes, it will be marked 74.

(The document referred to was marked as Plaintiff's Exhibit No. 74, and was received in evidence.) [34]

Mr. Lavine: The last exhibit for Mr. Dailey is 75, first cause of action No. 14 in the pleadings; the catalog number is 45954, tag 836, and there is no certificate.

(Testimony of Richard A. Lavine.)

(The document referred to was marked as Plaintiff's Exhibit 75, and was received in evidence.)

Mr. Lavine: Your Honor, counsel for defendants and myself have agreed that for the convenience of witnesses, Mr. Dailey may be called out of order, if the Court permits.

The Court: That is agreeable, Mr. Conron?

Mr. Conron: Yes, your Honor.

The Clerk: The last exhibit was 75?

The Court: Yes, it will be marked Exhibit 75.

#### OWEN N. DAILEY

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name.

The Witness: Owen N. Dailey.

The Clerk: Have that seat there.

#### Direct Examination

By Mr. Lavine:

Q. Mr. Dailey, you are the Mr. Dailey mentioned as a defendant in this case?

A. That is right.

Q. Mr. Dailey, what was your business or occupation prior to World War II, or immediately prior thereto? [35]

A. I was factory representative of Firestone Tire & Rubber Company.

Q. Did you before World War II work for Mr. Hougham, or Baker's Motor Mart?

(Testimony of Owen N. Dailey.)

A. I didn't hear.

Q. Before World War II did you work for Mr. Hougham at any time?

A. I didn't work for him, no, I think there may possibly have been a few days that I helped him out while waiting to go into the service, after I left Firestone.

Q. Likewise did you work for Baker's Motor Market prior to World War II?

A. It was the same.

Q. You were in World War II?

A. Yes.

Q. After you returned did you go back to Bakersfield?

A. Yes.

Q. And for whom did you work at that time, immediately after your return?

A. I went to work for Mr. Hougham, at the Baker's Motor Mart.

Q. What was your job for Mr. Hougham?

A. General manager.

Q. What were your duties in connection with that job?

A. Oh, trying to take Mr. Hougham's place when he was [36] gone, and handling the advertising, handling the overall operation of the organization.

Q. About this time did you make plans to go into business for yourself?

A. Yes, sir.

Q. What were those plans you made at that time?

A. I planned to become a dealer in my own right, car dealer, used truck dealer.

Q. Mr. Dailey, I show you Plaintiff's Exhibit

(Testimony of Owen N. Dailey.)

No. 1, and ask you to look over that exhibit, if you will?

A. Yes, sir.

Q. Directing your attention to item 5-A, which is marked with a check mark opposite the word "wholesaler," and below that is written ditto marks and the word "retailer." I believe it is stipulated into evidence this is your certificate?

A. Yes.

Q. What do you mean when you put down in the item I just read, wholesaler, retailer?

The Court: Do you happen to have an extra copy of that exhibit?

Mr. Lavine: I may have.

The Court: I just like to be looking at it, to follow.

Mr. Conron: I have one here, Mr. Lavine.

Mr. Lavine: I think there is also one in the interrogatories. [37]

The Court: I think that is true.

The Witness: What was the question?

Q. (By Mr. Lavine): My question was, what did you mean when you put on this certificate 5-A, wholesaler, retailer?

A. I meant wholesale sales and retail sales.

Q. Of what commodity?

A. Used trucks, used truck parts, used automobiles.

Q. What was your purpose in establishing this business for which this certificate was given, Mr. Dailey?

A. Primarily to get into business for myself.

Q. Now, in item No. 6, the question is asked "Is enterprise already established" and there is a

(Testimony of Owen N. Dailey.)

check mark after "yes." Was this enterprise you speak of already established?

A. It was established to the extent the required paper work had been done. I don't believe at that time there was any stock in trade, because it was dependent upon this application.

Q. Your answer to that, I take it, is it was already established in the sense there was paper work done?

A. That is right. I don't recall, there may have been one or two used cars there at that time, but not from government resales.

Q. Still on No. 6, as to the number of employees, the [38] number one appears thereon. Was there such an employee?

A. Number one was me.

Q. You are the employee. Still on question 6, it says, "If 'yes' are you now operating it" and you have put a check mark opposite the "Yes."

A. Yes.

Q. Were you so operating that business at that time?

A. Well, it wasn't inoperative; it was operated to the extent to which I was able to operate it.

Q. Were you conducting sales for this business at that time?

A. I was in the process of trying to get merchandise to sell at that time.

Q. But so far there had been no active sales?

A. I don't recall there had been.

Q. Calling your attention to item No. 10, on the

(Testimony of Owen N. Dailey.)

opposite side of the page, where there is a partial financial statement. It states therein "Working capital invested or to be invested in this enterprise: By proprietors (show share of each)" there then appears the sum of money of \$35,000. There is a line drawn through "bank loan" and "Is loan already arranged" both the "yes" and "no" are left with a line, and then in the margin is written "Personal fund, Bank of America." What does that mean, Mr. Dailey?

A. It means I was satisfied as to my own ability to [39] arrange for that amount of money whenever I needed to.

Q. Attached to this exhibit is letter from the Bank of America, stating you had an ample financial account. How was that line of credit established?

A. You would have to ask the Bank of America. I talked to him, and he checked with Bakersfield and satisfied himself as to my responsibility on the basis of the names that I gave him.

Q. Did you have at that time working capital to be invested by proprietor, meaning yourself, in the sum of \$35,000?

Mr. Conron: I object to that question as immaterial and argumentative. There is no statement on that application he ever personally owned \$35,000. I think the document speaks for itself.

The Court: Well, I think I will sustain the objection. I take it that the answer means that he felt he was in a position to pledge his own credit and receive \$35,000 from the bank. May I see the letter from the bank?

(Testimony of Owen N. Dailey.)

Mr. Lavine: Yes, your Honor. That is not attached to your certificate.

Q. Going down to item 10-B, you state your anticipated volume of sales is \$150,000. Do you recall at this time on what that estimate was based?

A. I don't recall definitely, no. I would say it was [40] undoubtedly an arbitrary figure. I assumed it could be that.

Q. In item 10-C you state one-half square block of warehouse space will be needed. Had you made plans for getting that storage?

A. Yes.

Q. Where was that?

A. 24th and K Streets, Bakersfield.

Q. That is where Baker's Motor Market was?

A. Baker's Motor Mart was using a portion at that time.

Q. I see. Going down to item 12-B, it states "that the enterprise described herein is one of which more than fifty per cent of invested capital or net income thereof is owned by or accrues to me, or to other eligible veterans." In this enterprise did anyone other than yourself own any proprietary interest?

A. It was a sole ownership.

Q. Did anybody else have any arrangement with you to share in the profits?

A. No.

Q. Had anyone except you made any promise to you they would supply any capital?

Mr. Conron: Object to that as immaterial.

Mr. Lavine: Not in the wording of the certificate.

The Court: I will overrule that objection.

(Testimony of Owen N. Dailey.)

A. I had an idea where the capital would be available. [41]

Q. (By Mr. Lavine): Where would that capital come from, Mr. Dailey?

A. Possibly through the bank, possibly through Mr. Hougham.

Q. Isn't it a fact at this time you already had an arrangement with Mr. Hougham, whereby he had agreed to provide the capital necessary to make the purchase on the basis of this certificate?

A. I couldn't tell you the exact statement that was made. Undoubtedly there had been discussion about the need for capital considering the way these sales were conducted. I had gone up there to buy merchandise at this sale that was going to be available.

Q. In item 12-D, it states "that I ~~am~~ not purchasing the property described herein for the benefit of any other enterprise, dealer, broker, merchant, or other undisclosed partner or principal." Was it the fact that there was no other dealer, broker, merchant or other undisclosed partner or principal involved?

A. No, I was purchasing for my own account.

Q. Did you have any discussions with Mr. Hougham during the year 1946, that you recall, concerning the purchase of any surplus government vehicles or trucks?

A. Yes, I would say we discussed vehicles many times.

(Testimony of Owen N. Dailey.)

Q. Do you recall any specific discussion, Mr. Dailey? [42]

A. Nothing specific, no.

Q. Wasn't the original arrangement that Mr. Hougham could purchase from you items that he was able to resell, and you could sell what you purchased yourself?

A. It was arrangement that they would be available to him or to anyone else. I was interested in selling them.

Q. Now, did you travel yourself to locations where these items were located?

A. Several times.

Q. Will you describe for us what type of sales were held on the occasions you just mentioned?

A. Well, there were—I think every sale was different. Basically, as I recall they were bid sales. The bid sales were more or less like an auction. On many of the sales you applied by mail for the purchase of the vehicle you ordered. There were other open sales which, as I recall, were available to anyone, veterans and otherwise.

The Court: Do you mean that the bid sales, or auctions as you call them, or mail orders, were also in connection with open sales?

The Witness: Not necessarily, there were open sales and there were bid sales. I guess there were bid sales that were open, or bid sales that required a certificate. There were several different types of sales. I am not familiar with all of them. My recollection is quite hazy [43] on the details involved in the various types.

(Testimony of Owen N. Dailey.)

The Court: But your recollection is there were bids on mail order sales that were open to veterans with these preferences?

The Witness: Yes.

The Court: And there were other bid and mail order sales that were open to the general public?

The Witness: That is as I recall it, yes, sir.

Q. (By Mr. Lavine): Confining my question only to veterans' sales, that is sales in which veterans would have priority, in those sales, Mr. Dailey, how did you pay for the various vehicles purchased by you using your veteran's preference?

A. If you were awarded the merchandise you paid for it in either cash or by certified check.

Q. In each case involving these veterans sales, where was the source of money you used to pay for these vehicles by cash or check?

A. As I recall I believe that in every case I had the cash.

Q. From what source?

A. There may have been a check involved. I don't recall if there was or was not for sure, but I do know the cash was the easiest way of handling it, because after the award was made the exact amount had to be paid, you had to have the [44] exact amount to the penny; they would give no change, and you had to have the cash or have a check drawn for that amount, and to have the check drawn you would have to run back to the bank.

Q. From what source did you get the cash? From the Bank of America, or some other bank?

(Testimony of Owen N. Dailey.)

A. From the Bank of America, or from Mr. Hougham.

Q. When you got cash from Mr. Hougham, in what form would he give you the cash?

A. What form?

Q. In what form would he give you the cash?

A. Bills and silver.

Q. And when you got money from the Bank of America whose credit was being used, yours or Mr. Hougham's?

A. Usually his, because of the fact that I had no credit established at these outlying areas.

Q. With his permission, you would draw a check on Mr. Hougham or the Baker's Motor Market?

A.. That is correct.

Q. And Mr. Hougham presumably would then honor these checks when they were presented on his account, is that correct, to your knowledge?

A. Yes.

The Court: Just let me understand. Did you in effect draw an order on Mr. Hougham, or did you have authority to [45] sign his name to the account, or how did you do it?

The Witness: I did not—as I recall the arrangements were made that so much money would be available to me if and when I needed it, and I can't—I am sorry, I can't recall the exact details in connection with it.

The Court: Well, do you recall, would you draw a check presumably on your own account through your bank?

(Testimony of Owen N. Dailey.)

The Witness: There was no check drawn.

The Court: There was no check drawn?

The Witness: No.

Q. (By Mr. Lavine): Did you have any written agreement with Mr. Hougham concerning this arrangement of using his name and credit to obtain the funds?

A. You mean a prearranged written agreement?

A. No, sir.

Q. Was there any written agreement after the sale?

A. Mr. Hougham trusted me and I trusted him. That seemed all that was necessary. There was a memorandum kept of the amount of money that changed hands.

Q. In addition to the memorandum of the money that changed hands, were there any I.O.U.'s?

A. You could call it that.

Q. There was a memorandum you might call an I.O.U. Who drew up the memorandum?

A. I don't understand. [46]

Q. As I understand, you drew up a memorandum of some sort or other, and the intended effect between you and Mr. Hougham was such that the written memorandum was that of an I.O.U., is that correct?

A. Well, if I understand your question correctly, there was some sort of memorandum or an I.O.U. when there was an exchange of funds. If that is the question, the answer is yes.

Q. Yes. After each of these transactions there

(Testimony of Owen N. Dailey.)

was an indication by you and Mr. Hougham that at some later date you would pay back the funds borrowed to Mr. Hougham, is that correct?

A. I think both Mr. Hougham and I depended on the bookkeeper to keep both of us straight.

Q. Do I understand that there was some kind of a memorandum for each transaction in the sum which you borrowed or used, is that correct?

A. For each exchange of funds, yes.

Q. After you purchased the vehicles, and in each case when I say purchased the vehicles, I mean purchased them at a veterans' sale, how did you get the vehicles?

A. How would we get the vehicles to Bakersfield?

Q. Yes, Mr. Dailey.

A. Well, it depended on what was left of the vehicle when we went to get it. A great many times between the time [47] the merchandise was inventoried and the time the sale was consummated and you went back to get it, the vehicle would practically be stripped. There was no assurance it would be in the condition as you last saw it. There were trucks hauled back to Bakersfield, trucks without wheels, trucks without motors or trucks without batteries. The components of the truck had been stripped from the truck before it was picked up.

Q. Mr. Dailey, in that respect you heard the various sales read into evidence this morning, is that correct?

A. I didn't get that.

(Testimony of Owen N. Dailey.)

Q. We referred to various sales and put in evidence Exhibits Nos. 1 to 75, which included these sales folders. All those sales were consummated sales between the government and yourself, weren't they? A. That is right.

Q. And you purchased all these vehicles?

A. That is right.

Q. I understand your answer to be that somehow you got the vehicles to Bakersfield, either driven there or driven on other trucks, but anyhow the merchandise was delivered by you or to you in Bakersfield. Is that correct? A. Yes.

Q. Now, what did you do with the vehicles when they got to Bakersfield? [48]

A. Put them in condition, salable condition.

Q. Isn't it true, Mr. Dailey, that you sold most of these items to Baker's Motor Market?

A. Yes, sir.

Q. And you received \$10 for each of such items?

A. I would say probably most of the items. I think it averaged out about that. There were items that I mentioned a moment ago you were lucky to break even on.

Q. Now, in the event the sale was to Baker's Motor Market, the I.O.U. or memorandum, or whatever it was, would be cancelled, would it not?

A. Well, yes.

Q. And in the event the sale was to a third person you would turn over the receipts to cancel out the obligation, is that correct?

A. I don't understand that.

(Testimony of Owen N. Dailey.)

Q. In the event that the sale was to some other than to Baker's Motor Market, in that case you would turn the receipts from the sale over to Mr. Hougham and cancel out that portion of the debt?

A. Yes, sir.

Q. Did you keep any records of your own business at that time? A. Yes, sir.

Q. Incidentally, where was your business conducted from? [49]

A. Part at home and part from the office of Baker's Motor Market.

Q. Incidentally, do you have any of these records at this time? A. No, sir.

Q. What happened to them?

A. We had a flood in 1949, had about a foot of water in our houses and all our papers were lost, and a great many other things.

Q. Did you file an income tax return in the name of Owen N. Dailey Motor Company?

A. I don't think so. I think probably it was—I don't think there was any return filled out in the name of Owen Dailey Used Cars. It is undoubtedly filled out in the name of Owen and Helen Dailey.

Q. On your return, whether individual or joint, with your wife, did you list any of the income from your company the Owen Dailey Company, as an individual?

A. This is all income for that year.

Q. Would there be a reference down in your income tax return that part of this was from Owen N. Dailey Company?

A. I couldn't say.

(Testimony of Owen N. Dailey.)

Q. You don't recall?

A. I don't recall. I had an auditor fill it out, I gave him the information and he made out the return. [50]

Q. Did your individual company have any employees?

A. Any employees?

Q. Yes.

A. Myself.

Q. Now, was any of the work done on your equipment which you purchased at these veterans' sales for your own company work done by employees of Baker's Motor Market?

A. Yes, we worked together. I worked on other merchandise, and when I was in a bind others would help me. It was a co-operative enterprise as far as work was concerned.

Q. Did Mr. Hougham employ at Baker's Motor Market persons other than yourself to work on vehicles?

A. There were several.

Q. Do I understand from your answer, there was no separate record kept as to work on your vehicles and those for Baker's Motor Market; is that correct?

A. As far as I can recall, I wouldn't—I don't think there was any record kept of any given amount of man-hours or what went into any one vehicle, unless it was a major modification that had to be made. That was not only in my case, but in the case of any—that is an accounting problem. I don't know. There may have been, but I wasn't aware of it.

(Testimony of Owen N. Dailey.)

Q. Did you pay individually any of the employees of Hougham for work done on your vehicles?

A. No, sir. [51]

Q. Did you pay Mr. Hougham for any work done on your vehicles? A. No.

Q. Did you pay Mr. Hougham for any storage or rental for the use of his premises?

A. I don't think so.

Q. You stated that some of these vehicles came to you in a stripped condition. Was it necessary to put these vehicles into workable and salable condition? A. That is right.

Q. Where would the spare parts come from to put these vehicles into workable and salable condition? A. Out of our stock.

Q. Whose stock?

A. Baker's Motor Market.

Q. Would you pay Mr. Hougham for any of these used parts?

A. The bookkeeper handled that end of it. There were, as I said a moment ago, in a case of major modification there were records kept on it, that was added to the cost of the equipment.

Q. Do you know that of your own knowledge?

A. I am reasonably sure of it.

Q. For what you term minor spare parts there was no accounting made?

A. I don't think so. I believe, incidentally, that is [52] common practice even today.

Q. Do you recall what salary you obtained from Mr. Hougham at this time?

A. I believe \$100 a week.

(Testimony of Owen N. Dailey.)

Q. Did he give you anything else out of his business except that salary?

A. There was a bonus at the end of the year, which as I understand covered the cost of the equipment that he bought.

Q. Would this be over and above the \$10 he paid you for each vehicle? A. Yes.

The Court: Just let me see if I understand that. You said that the bonus—what was the bonus based upon?

The Witness: The difference between the cost and the selling price of the vehicles that I sold to Mr. Hougham.

The Court: Oh. In other words, that was handled on an annual basis?

The Witness: Well, it wasn't an annual basis. I wasn't there a year.

The Court: I see.

The Witness: About six months. It was at the end of the year, about Christmas time.

Q. (By Mr. Lavine): Referring now to the vehicles that you had that needed repair, overhaul, to be made into usable salable [53] were those vehicles taken to any other place, other than Baker's Motor Market, for repair work or parts?

A. There were occasions, yes, where glass was installed.

Q. Do you recall where glass would be installed for you?

A. Some place on 19th Street in Bakersfield,

(Testimony of Owen N. Dailey.)

that is all I can tell, some combination junk yard and auto parts.

Q. Who would pay the bill for this glass work?

A. Baker's Motor Market.

Q. Do you recall the different locations you traveled to in attending veterans' sales, Mr. Dailey?

A. Oh, San Francisco, Los Angeles, Port Hueneme.

Q. Did you usually travel to these locations to attend these sales?

A. I didn't understand.

Q. Would you usually travel to these locations to attend these sales yourself?

A. Did I myself?

Q. Yes. A. Yes.

Q. Were your expenses on these trips paid by Mr. Hougham or Baker's Motor Market?

A. It is possible that they were and charged back to me. Or it is possible that it was a Baker's Motor Market transaction and that I was on an expense account. [54]

Q. You were on an expense account with Baker's Motor Market?

A. When I was away from town.

Q. To the best of your recollection, the expense for travel and hotel bills, lunch, gasoline, would those items or any of them be paid by Baker's Motor Market?

A. If it was pertaining to Baker's Motor Market business. Pertaining to my purchases I paid it.

Q. Getting back to your attendance at these sales,

(Testimony of Owen N. Dailey.)

these particular veterans' sales, who would pay the expenses of these particular trips?

A. We all paid our own expenses, and there were dinners bought by Mr. Hougham on occasion.

Q. How about your gasoline bill, who paid that?

A. How much gasoline bill?

Q. How about the gasoline bill? Did you pay for the gasoline? A. I couldn't say.

Q. Could it be Mr. Hougham paid for the gasoline, or Baker's Motor Market?

A. I don't know there was gasoline involved very often.

Q. How would you get to these various sales?

A. Usually by train.

Q. Traveling to San Francisco; who would pay your train fare? [55]

A. As I recall, I bought my own ticket.

Q. Now, going to Port Hueneme, for the record would you locate where Port Hueneme is for us?

The Court: Well, I know that it is around by Ventura, isn't it, Oxnard?

Mr. Lavine: Yes, your Honor, southwest of Oxnard.

Q. How would you get to Port Hueneme?

A. We went down—I can remember once that I drove down, if I remember correctly, in my own jeep. There was once that I went down with a group of other fellows, about six of us in one car.

Q. Now, on those occasions when you laid out certain sums for your trips and expenses, isn't it a

(Testimony of Owen N. Dailey.)

fact that you were usually reimbursed by Baker's Motor Market for your expenses?

A. If it was for Baker's Motor Market business.

Q. I am referring now to the occasions when you went to these veterans' sales, except for the vehicles purchased by you, was there any other business of Baker's Motor Market involved?

A. I didn't follow you.

The Court: Read the question, Miss Schulke.

(Question read.)

A. Yes, could have been. I think there were on occasion.

Q. (By Mr. Lavine): What type of business, Mr. Dailey? [56]

A. Possibly clerical, paper work, or something like that, or inspection of other equipment desired by Baker's Motor Market.

Q. Say, when we have a trip by you to Port Hueneme, if there was other business pertaining to Baker's Motor Market at Port Hueneme, you would then charge off the expense of the trip to Baker's Motor Market, is that correct? A. Probably.

Q. What other business was there at Port Hueneme for Baker's Motor Market?

A. I—if I remember correctly, I checked some other items, for not only Ben but for other dealers at Port Hueneme. I am not really sure. I remember looking at some equipment, but I don't know whether it was for myself or someone else. I think it was for Ben and another dealer.

(Testimony of Owen N. Dailey.)

Q. Did Mr. Hougham or Baker's Motor Market, to your knowledge, purchase any equipment at war surplus sales at this time on any non-veteran's basis?

A. You say, did Baker's Motor Market purchase any merchandise on a non-veteran basis?

Q. Yes. A. Yes; I am sure he did.

Q. Did you attend the sales on those occasions?

A. I don't recall whether I did or didn't.

The Court: Was there any instance on which you made a [57] trip to Hueneme for the sole and only purpose of bidding or purchasing vehicles set aside for veterans only?

A. I don't recall, sir.

Q. (By Mr. Lavine): Did you make any visit to Port Hueneme to purchase vehicles for Mr. Hougham on a non-veteran basis?

A. I wouldn't make any attempt to differentiate between the various types of sales, or what was even done at Hueneme. I remember going down there with a group of other men. As I recall, there was merchandise bought, whether I bought it I don't know. And I looked at some other merchandise. The second time I went down there I don't remember what I went down for. The only thing I remember I got wet in a driving rain.

Q. You don't recall now whether you attended Port Hueneme for sales other than veterans' sales, is that correct?

A. All this was a mystery to me. I just got into it and I couldn't figure out what kind of a sale was what, veteran's priority, if they said you had to

(Testimony of Owen N. Dailey.)

have a veteran's priority, I had the priority. If you didn't have to it was something else.

Q. Was this all a mystery to you, Mr. Dailey, how these sales were conducted?

A. It is all Greek to me, yes.

Q. Referring now to San Francisco, do you recall attending [58] sales in San Francisco other than veterans' priority sales?

A. There again, there may have been. As I recall, and I wouldn't swear to this, as I recall there were combination sales, there were some sales that priorities were necessary, and some sales where anyone could buy anything they wanted. I don't know which were which at this time.

Q. Do you recall any trips to San Francisco for veterans' sales in which you paid for the train fare?

A. Yes; I am sure I did.

Q. Did Mr. Hougham recompense you for such train travel?

A. I don't recall, I don't think so. I was up there several times. I don't remember who I went with each time. I think there were one or two times when I was alone.

Q. Mr. Dailey, referring to Exhibit 1, to the letter from the Bank of America which is attached to Exhibit 1, which you read, signed by H. F. Hogan, do you know Mr. Hogan?

A. Do I know him?

Q. Yes.

A. I haven't seen him since the day he made that up.

(Testimony of Owen N. Dailey.)

Q. Do you recall who introduced you to Mr. Hogan? A. Mr. Hougham.

Q. At this particular occasion did you fill out a financial statement for the Bank of America?

A. I couldn't recall whether I did or didn't.

Q. Do you recall at the present time what your financial assets were, in rough figures?

A. My personal account?

Q. Around July, 1946?

A. Well, they were probably in the red.

Q. In other words, you probably had a negative balance, or broke about even?

A. I had a good credit rating and nothing else except a uniform.

The Court: Had you known this bank official prior to being introduced to him by Mr. Hougham?

The Witness: I don't recall I did. It is possible that I had known him before the war, as I understand he was in Bakersfield at one time. Mr. Hougham introduced me, for, according to the man at the War Assets office, I had to furnish proof of financial responsibility, so as I recall I contacted Ben, Mr. Hougham, and he said he would introduce me to this man and see what could be done so I wouldn't have to run back to Bakersfield and back to San Francisco, so Mr. Hogan, as I recall it, made some inquiry by telephone, and the next morning, I believe it was, I picked up the letter he has there.

Q. (By Mr. Lavine): Was the financing of any of these veterans' preference vehicles involved in this action financed by means of conditional sales

(Testimony of Owen N. Dailey.)

papers? [60]

A. Conditional sales papers?

Q. In other words, contracts with the bank in which the bank retained legal ownership of the vehicle, in which you or some other person acting for you was the registered owner of the vehicle?

A. You mean, did I buy anything from the government based on my borrowing money from the bank on conditional sales contracts?

Q. Correct.

A. No.

Q. In any of these cases, did the bank take any other kind of security interest as a condition for giving you a check or other cash?

A. No, sir.

Q. By that I understand they had no flooring arrangement with you?

A. That end of it was all handled by the book-keeping department of Baker's Motor Market. I don't understand it.

Q. To your knowledge, after the vehicles got back to Baker's Motor Market, was there any security interest retained by the bank in these vehicles?

A. I couldn't say.

The Court: Just a minute, would you get a bill of sale or some other document from the government?

The Witness: Yes, sir. [61]

The Court: And would that bill of sale run in your favor, your name?

The Witness: Yes, sir.

The Court: Do you ever recall executing any agreement with the bank based upon your ownership of these vehicles?

(Testimony of Owen N. Dailey.)

The Witness: No, sir. As I recall it, Mr. Hougham was my collateral, so to speak. He agreed to underwrite anything that I would commit myself to.

The Court: I see.

Q. (By Mr. Lavine): Did you pay Mr. Hougham any interest on the funds you borrowed from him, previously referred to? A. No interest.

Q. Did you pay him any service charges on this money borrowed by you?

A. No; I don't think so. I don't recall any.

Q. Did you at any time have any financial interest in Baker's Motor Market?

A. No, sir. May I clarify that?

Q. Please do.

A. When I went into the business, when I first came home, Mr. Hougham indicated his desire to retire within a few years and he said that I would acquire a half interest in the business over a period of time, if everything worked out, that is, if I liked the business and we proved to be [62] compatible in operation.

Q. Do I understand, Mr. Dailey, that you had no agreement in writing concerning your terms of employment, or other arrangement with Mr. Hougham?

A. No; it was wide open. When I resigned I left on about ten days' notice.

Q. Do you recall when you left Mr. Hougham's business?

A. Yes; I imagine that it was some time, I be-

(Testimony of Owen N. Dailey.)

lieve, in January of 1947, give or take a few days.

Mr. Lavine: That is all I have.

The Court: You started, as I understand it, some time in the middle of 1946?

The Witness: I started on the 5th of July. I remember I got home the day before the 4th and started the day after the 4th. I had made my arrangement to go to work back in June when I was home on leave.

The Court: When were you discharged, the latter part of June?

The Witness: I was discharged, I believe, along about the 27th, 28th, 29th of June, but I was on terminal leave until about August or September.

The Court: I think we will take a recess at this time.

(A short recess was taken.) [63]

Cross-Examination

By Mr. Conron:

Q. Mr. Dailey, can you tell us approximately when you entered the military service in World War II?

A. It was, I believe—I believe the arrangements were made in January, 1942, and I wasn't called until later in the summer.

Q. And what branch of the service did you enter?

A. Army Air Force.

Q. And were you discharged from the service?

A. I was separated; I am still in the Reserve.

(Testimony of Owen N. Dailey.)

Q. And did you receive what you might call an honorable separation? A. Yes.

Q. What was your rank at the time of separation? A. First lieutenant.

Q. Now, you have told us you know Mr. Hougham. When did you first meet him?

A. I believe it was in 1940.

Q. And your relations were friendly with Mr. Hougham from 1940 to the present time?

A. Yes, sir.

Q. Did you make an application to the State of California for an automobile wholesaler-retailer license? A. Yes, sir.

Q. You secured such a license? [64]

A. Yes, sir.

Q. Such a permit? A. Yes, sir.

Q. And the compensation required to secure that permit, was that entirely advanced by you?

A. Yes.

Q. And you received a permit from the State Board of Equalization for a retail sales permit?

A. Yes.

Q. The cost of that application was entirely paid for by you? A. Yes.

Q. Now, Mr. Dailey, Mr. Lavine showed you Plaintiff's Exhibit 1, the application that you made to the veterans for a priority certificate. You have examined that, have you not? A. Yes.

Q. The handwriting on that document is your handwriting? A. I am sure it was.

Q. Was Mr. Hougham present when this docu-

(Testimony of Owen N. Dailey.)

ment was prepared and signed? A. No, sir.

Q. Did he counsel or advise you concerning any statement contained therein?

A. No, sir. [65]

Q. To your knowledge did he know of the contents of this application prior to the filing of this action? A. No.

Q. You heard the list of articles offered into evidence in these 75 exhibits this morning. You have no personal memory or recollection at the present time of any one of those applications or articles? A. No.

Q. But you do recall in a general way having purchased articles similar in character and similar in quantity to those set forth in the complaint?

A. Yes.

Q. I believe you told us that the source of funds that you used to make these purchases came primarily from Mr. Hougham, or by his being collateral on your banking arrangements?

A. Yes.

Q. And the disposition of the articles which you made after purchasing from the government?

A. I didn't understand.

Q. What disposition did you make of the articles after purchasing the same from the government? I believe you told us that Hougham received a substantial number?

A. They were sold, yes, mostly to Baker's Motor Market.

(Testimony of Owen N. Dailey.)

Q. And some were sold to other persons [66] direct? A. Yes.

Q. Now, of the articles transferred to Hougham, was there a difference between the price paid to you by him, and the price paid by you to the government?

A. In most cases I would say there was.

Q. Now, who retained the spread between the cost to you from the government and the sales price that you received from Hougham? A. I did.

Q. Did he participate in any way in this spread?

A. No.

Q. And you did in addition to buying and selling receive a salary from Hougham?

A. Yes.

Q. And that salary was for your duties as office manager and sales director? A. Yes.

Q. And were those duties separate and apart from your activities in purchasing war surplus material? A. They were separate, yes.

Q. Under your priority certificate, I mean.

A. Yes.

Q. Now, with respect to your duties as Mr. Hougham's employee, Mr. Dailey, in quantity of time, as compared to the quantity of time you engaged in purchasing war surplus, [67] what percentage of your total time did your duties to Hougham require, other than this dealing in war surplus?

A. I couldn't tell you exactly. The time was pretty well mixed up. I mean it wasn't so many

(Testimony of Owen N. Dailey.)

hours a day that I worked for Baker's Motor Market and so many hours I worked for myself.

Q. Well, you have an idea. Would it be as high as 90 per cent for Hougham?

A. Probably 80 to 90 per cent.

Q. Now, did you in 1946, or at any other time, conspire or agree with Ben Hougham for him to use your veteran's priority certificate to obtain war surplus supplies?

A. No, sir.

Q. Did Hougham select and specify the purchase by you of the articles set forth in the complaint, and that have been referred to in the evidence?

A. He didn't specify. I asked his advice on many occasions.

Q. Specifically, did Hougham cause you to make any certification of any character to the War Assets Administration or to the Veterans Administration?

A. No.

Q. In order to secure your veteran's certificate?

A. No.

Q. Did Hougham cause you to certify or represent that [68] you had an enterprise already established?

A. I didn't understand that.

Q. Did Hougham cause you to certify or represent you had an enterprise already established?

A. No.

Q. You did, however, have an enterprise to the extent that you had qualified as a wholesale and retail car dealer?

A. Yes.

Q. Did Hougham cause you to certify that you

(Testimony of Owen N. Dailey.)

were the only person financially interested in the enterprise, in filling out the application?

A. No.

Q. Or that the funds for the enterprise were being put up by you? A. No.

Q. Or that you were not purchasing the property for the benefit of any other enterprise, dealer, broker or merchant? A. No.

Q. Or that the enterprise was one in which more than fifty per cent of the capital invested or the net income was owned by you or would accrue to you?

A. No.

Q. And did Hougham ~~cause~~ you to certify to the statements made in your application, that they were true, to the [69] best of your knowledge?

A. No; he had no—(pause).

Q. So far as you know, did Hougham have any knowledge that any representations made by you were false? A. No; he had no knowledge of it.

Q. And were known by you to be false?

A. No.

Q. When you signed your veteran's application for a priority certificate, did you have any knowledge that there was any false statement in the application? A. No.

Q. Did you intend to conceal any material fact to the government in making the application or in purchasing the articles secured therein?

A. No.

Q. Is it true that at the time of signing this application you bona fide believed that you were the

(Testimony of Owen N. Dailey.)

owner of a business enterprise?      A. Yes.

Q. And of what did this enterprise consist?

A. It consisted of a budding used car and used truck business.

Q. In making this application, did you do so for the benefit of Hougham, or for yourself?

A. Strictly for myself. [70]

Q. And you did in fact receive benefits from the transaction?      A. Yes.

Q. Now, Mr. Dailey, from your observation of the manner that Baker's Motor Market was conducted both before the war and after the war, in the year 1946, was that business conducted in an orderly businesslike manner by Hougham?

A. Yes, I would say it was.

Q. And were his prices speculative, or were they the usual market prices for articles of the character that he handled?

A. They were always well priced; and there was no speculation involved, and no black marketing involved.

Q. And as a result of your association with Hougham from the time of your separation from the service, do you believe that the assistance you received from him enabled you to rehabilitate yourself from military to civil life?

A. Very definitely.

Q. I didn't hear.      A. Very definitely.

Q. Now, I believe you stated to Mr. Lavine that at certain times you would go to these sales to make purchases under your priority certificate, and at

**JAMES J. GALBREATH**

resumed the stand as a witness for plaintiff, and was examined and testified further as follows:

**Direct Examination**

Mr. Lavine: Your Honor, I am going to refer in the next few minutes to Exhibits 76 to 93, on which I make a definite distinction. All my present exhibits will be to the second cause of action, and will apply to Hougham and Schwartze.

I offer next as Plaintiff's Exhibit 76 a Veteran's Application, original thereof, of William E. Schwartze, defendant in this action, apparently signed by Mr. Schwartze, and dated March 20, 1946, bearing the veteran number 10-A-24067.

The Court: It will be marked Exhibit 76. What is the date of it?

(The document referred to was marked as Plaintiff's Exhibit No. 76, and was received in evidence.)

**PLAINTIFF'S EXHIBIT No. 76**

War Assets Corporation

Budget Bureau No. 12-R2568

**VETERAN'S APPLICATION FOR SURPLUS PROPERTY  
(Under SPB Reg. 7)**

Case No: 10-A-24067.

Date: 3/20/46.

1. Applicant: William E. Schwartze.
2. Mailing address: 525 Jones Street, San Francisco, California.

(Testimony of James J. Galbreath.)

3. If other application has been filed on this form, SWPC-66, indicate place and date of filing: [Blank.]
4. Trade name of enterprise: Schwartze Truck Rental.
5. Address of enterprise: 525 Jones St., San Francisco, California.
6. (a) Type of enterprise: Business.  
(b) Legal form of enterprise: Individual Proprietorship.  
(c) Description of enterprise: Truck Rental.
7. Is the enterprise already established: Yes.  
If "Yes," are you now operating it? No.  
How and when do you plan to start your operations if you are starting a new enterprise or buying into an existing enterprise? I plan to start with the surplus units I obtain.
8. Size of enterprise: [Blank.]
9. What experience, training, and/or education have you had which you believe assures the success of this enterprise? Have worked for a truck dealer as a salesman.
10. Description of items wanted:
  - (a) Quantity: 5.
  - (c) Description: Truck, Weapons Carrier, 1/2-ton. (45-1300) [In red pencil.]
  - (a) Quantity: 9.
  - (c) Description: 4-tons, Heavy Duty Diamond-T (trucks 45-1300) [In red pencil.]
  - (a) Quantity: 15.
  - (c) Description: Low-bed Freuhauf, 22-tons (45-2100) [In red pencil.]
11. Will you desire the extension of credit by SWPC in the purchase of any of the items listed above? No.  
... ..
18. I hereby certify that all of the foregoing statements are true to the best of my knowledge and belief, that I served in the active military or naval services of the United States on, or

## (Testimony of James J. Galbreath.)

after, September 16, 1940, and prior to the termination of the present war and was discharged or released therefrom under honorable conditions; that I am, or will be, directly or indirectly, the sole proprietor of the enterprise described herein, or, that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof; that the capital invested in the enterprise does not, or will not, exceed \$25,000 if an agricultural enterprise, or \$50,000 if a business or professional enterprise, that I am not procuring the property listed in this application for the purpose of resale; and that said property is to be used in and as part of the enterprise described herein.

3/20/46.

/s/ W. E. SCHWARTZE,

Signature of Applicant.

It Is a Criminal Offense, and a Felony, to Make a Wilfully False Statement or Claim, Directly or by Any Trick or Scheme, to Any Government Agency, as to Any Matter Within Its Jurisdiction. (Sec. 35A, U. S. Criminal Code). Heavy Civil Penalties Are Also Provided for the Fraudulent Obtaining of Surplus Property. (Surplus Property Act, Sec. 26.)

Action Taken by Government Officials  
(Not for Applicant's Use)

19. I certify that the following information appeared on the discharge papers or a certificate of satisfactory completion of active duty shown me by the applicant.

- (a) Last service: Army.
- (b) Serial number: T-70027 CAP.
- (c) Type of papers presented: P/S Hon. Disch.
- (d) Date of discharge or release: Oct. 19, 1945.

Discharge or Release: Under honorable conditions.

• • •

(Testimony of James J. Galbreath.)

21. I approve this application for the acquisition of surplus property.

/s/ C. A. PENFIELD,  
SWPC District Manager.

Date: 3/20/46.

[Endorsed]: Filed September 24, 1957.

Mr. Conron: March 20, 1946.

Mr. Lavine: March 20, 1946. I offer next as Exhibit 77 a folder of the Federal Records Center, marked 8542, which contains miscellaneous documents pertaining only to the defendant Schwartze, your Honor.

Mr. Conron: Have I seen that? [81]

Mr. Lavine: That is the one you saw just before court.

Mr. Conron: No objection.

Mr. Lavine: It contains, among other things, your Honor, various veteran's preference certificates, and other associated documents.

(The document referred to was marked as Plaintiff's Exhibit 77, and was received in evidence.)

Q. (By Mr. Lavine): Mr. Galbreath, I show you Plaintiff's Exhibit 78 for identification, which purports to be sales manual, catalog number 45233, and I ask you whether you recognize this document?

Mr. Conron: I will make the same stipulation, that it is in the possession of, in the archives, subject

(Testimony of Owen N. Dailey.)

that same time you would do investigating work for Baker's Motor Market or for Mr. Hougham? [71]

A. Yes.

Q. Now, to clarify that, so his Honor will fully understand what you had in mind, is it not true that these war surplus sales were roughly divided into four groups in the order of priority, the first being government agencies like schools, counties or cities, and the second veterans for their personal use—

A. Yes.

Q. —and the third dealer veterans?

A. I believe so.

Q. Then after that the general public or anybody? A. Yes.

Q. And there was no restriction on Mr. Hougham or anybody else buying at these open sales?

A. Not as far as I know.

Q. And it would be the same merchandise that would be offered for sale in that order of priority?

A. Yes.

Q. So when you were present at a sale purchasing under your veteran's certificate, you still look around and analyze what remained for the purpose of seeing whether it was of value to Baker's Motor Market? A. Yes.

Q. On the open sales? A. Yes. [72]

Q. Now, among the articles, Mr. Dailey, listed in this group is a jeep, and I believe your certificate stated that you purchased that jeep for your personal use. What use did you make of this article?

A. I was unable to buy a car on the open market

(Testimony of Owen N. Dailey.)

when I got home and I needed transportation, I had none, and so I figured the jeep would be as good as anything I could get so I—at the time I was originally certified, if I remember correctly, I asked for veteran dealer priority for resale, plus one piece for personal use, which was the jeep, and I was awarded that, and eventually was able to get a jeep.

Q. And what use did you make of the jeep?

A. I drove it for my own personal use.

Q. How long? A. Nine months.

Q. What condition was it in when you first acquired it?

A. The catalog said it was new, but when I got it it was new from the standpoint of mileage, it had about 1,000 miles on it, but it was wrecked.

Q. And you had to spend funds to repair it?

A. Yes.

Q. Were they your personal funds?

A. Yes.

Q. And you used it yourself for a period in excess of nine months? [73]

A. Approximately nine months.

Q. The balance of the articles you certified on your application that they were for resale?

A. Yes.

Q. And you feel that your activity in handling those articles in each case constituted a bona fide purchase and sale?

A. Yes; very definitely.

Mr. Conron: That is all.

The Court: I would like to ask Mr. Dailey a

(Testimony of Owen N. Dailey.)

couple of questions. I don't quite understand in my own mind the *modus operandi* of the Bank of America in furnishing funds. Now, as I understand, the witness testified that at least in most instances he took cash. I assume in the form of currency and silver, up to these sales?

The Witness: Yes.

The Court: And I think the testimony was that in most instances the cash was furnished by Mr. Hougham?

The Witness: Either by Mr. Hougham or by the bank through a note or something of that kind.

The Court: Well, in other words, Mr. Hougham would give you a note to the Bank of America, to let you have, we will say X dollars in cash?

The Witness: Yes.

The Court: Oh, I see. Now, the second question, in [74] establishing your own enterprise or in operating it, were you interested only in purchasing at sales, that is for your own account in purchasing at sales where there was a veteran's priority?

The Witness: No, sir.

The Court: In other words, you would be interested as operating your own business in vehicles that were available to the general public?

The Witness: Yes, sir.

The Court: And Mr. Hougham was in the same situation?

The Witness: Yes, sir.

The Court: Was there any competition between the two of you as to those?

(Testimony of Owen N. Dailey.)

The Witness: No competition. I can't recall of any competition between us at any time.

The Court: Well, then, at least on occasion when you would go up to attend a priority sale which you were concerned with in your own business, you might inspect vehicles that might be available to the general public?

The Witness: Yes.

The Court: For your own account?

The Witness: Yes.

The Court: And you might also inspect vehicles that Mr. Hougham might be interested in?

The Witness: Many times I inspected vehicles for him that [75] I wasn't interested in.

The Court: I see. Now, the last question, when you talk about the spread between what you paid the government and the price, we will say, that you sold to Mr. Hougham for, was that always a fixed spread?

The Witness: No, sir. May I interject there? That was a very common thing among dealers, there was a lot of horse trading back and forth where one dealer had a piece of merchandise he didn't particularly want and another one had one that he didn't particularly want, and they would trade merchandise. A portion might be merchandise and a portion might or might not be cash, sometimes for a give and take a little, sometimes \$10, \$20, \$20. In my case I would say it would average out fairly close to \$10; in some cases it was nothing.

The Court: Well, now, when you are talking

(Testimony of Owen N. Dailey.)

about the spread between your cost and the selling price, we will say that the vehicle had to undergo major repairs?

The Witness: Yes.

The Court: Now, would the spread be the difference between your cost to the government and the selling price, or your cost plus the cost of repairs and the selling price?

The Witness: It would be my cost plus the cost of repairs, if it was a major item.

The Court: Yes. I have no further [76] questions.

#### Redirect Examination

By Mr. Lavine:

Q. Mr. Dailey, you mentioned that on some occasions you would sell these vehicles to parties other than Mr. Hougham. Would any of these parties be members of the general public?

A. You say, would they be members of the general public?

Q. Yes. A. Yes.

Q. Now, did you obtain a sales tax permit from the State of California? A. Yes.

Q. Prior to making such sales? A. Yes.

Q. Did you collect the sales tax from those persons? A. I am sure I did.

Q. To whom you made such sales?

A. I am sure I did.

Q. And did you pay such sales tax to the State of California? A. Yes.

(Testimony of Owen N. Dailey.)

Q. Did you account to the State of California for such sales?      A. Yes.

Q. When you sold to Mr. Hougham, did you account to the [77] agency of the State of California that handles sales taxes by putting down the resale number of Mr. Hougham's Baker's Motor Market?

A. I couldn't tell you. As I recall now, I don't remember, maybe I did or maybe I didn't make out the sales tax return myself. I think there were times, maybe all the time, when the bookkeeper at Baker's Motor Market made them out for me and mailed them at the same time Baker's Motor Market was mailed in.

Q. The best of your recollection is perhaps the bookkeeper for Baker's Motor Market took care of furnishing the State of California with all this sales tax information concerning resales to Baker's Motor Market, is that correct?

A. I don't know whether I follow that or not.

The Court: Well, is there a sales tax imposed by the State of California on the sale between dealers?

Mr. Lavine: As I understand it, your Honor, and I can be wrong, when you sell to someone other than to a member of the general public, you mark down in your records the sales tax permit of that dealer and indicate that it is a non-taxable sale, and have your records available, and make a report that such is a non-taxable transaction. That is my understanding of the California Law.

The Court: Is there any difference between a retail sale and wholesale sale? [78]

The Witness: For resale there is no tax collected.

(Testimony of Owen N. Dailey.)

The Court: Well, what do you mean for resale. Suppose that I approached you, we will say in 1946, and purchased a vehicle. You would have collected the sales tax?

The Witness: If it was for your personal use.

The Court: Suppose I was going to use it for my own use.

The Witness: Then you would collect the sales tax.

The Court: If I told you that I was purchasing it for resale?

The Witness: No sales tax.

The Court: And what record, if any, would you make, if you know, concerning that transaction?

The Witness: I don't recall now. I believe there was some form to fill out. I am no bookkeeper.

The Court: All right, Mr. Lavine.

Mr. Lavine: If I can clarify some legal points: It is my understanding in talking to legal representatives of the State of California, as far as purchase or sales of vehicles for you or I as private individuals, if I were to sell my vehicle to you, I pay no sales tax on that nor do you pay it to me. However, if we engage, or if I engage in more than the magic number of three sales in a year I would be regarded as being in business and would be responsible and pay over that tax.

Q. Mr. Dailey, you said that you yourself kept no track [79] of what repairs were made to these vehicles, is that correct?

(Testimony of Owen N. Dailey.)

A. I don't recall. There undoubtedly was some in the case of major overhauls.

Q. Well, now, keeping to so-called minor, as distinguished from major overhauls, in those instances where a vehicle would require certain minor repairs and overhaul by Baker's Motor Market, how could you keep track of that in fixing the retail price to Mr. Hougham?

A. Mr. Hougham had an excellent bookkeeper, better than Mr. Hougham and myself and ten others put together. This bookkeeper managed to keep the figures straight, and both of us trusted her. That is how it was handled.

Q. In effect, Mr. Hougham set the resale price, is that correct?

A. Yes.

Mr. Lavine: No further questions.

Mr. Conron: That is all.

The Court: That is all, Mr. Dailey.

Mr. Lavine: Mr. Conron, as far as I am concerned, Mr. Dailey may be excused.

Mr. Conron: Thank you. You may be excused so far as I am concerned.

The Court: Mr. Dailey, so far as the Court is concerned you may be excused from further attendance.

(Witness excused.) [80]

Mr. Lavine: If your Honor please, I would like to recall Mr. Galbreath to the witness stand.

(Testimony of James J. Galbreath.)

It Is a Criminal Offense, and a Felony, to Make a Wilfully False Statement or Claim, Directly or by Any Trick or Scheme, to Any Government Agency, as to Any Matter Within Its Jurisdiction. (Sec. 35A, U. S. Criminal Code.) Heavy Civil Penalties Are Also Provided for the Fraudulent Obtaining of Surplus Property. (Surplus Property Act, Sec. 26.)

Action Taken by Government Officials  
(Not for Applicant's Use)

19. I certify that the following information appeared on the discharge papers or a certificate of satisfactory completion of active duty shown me by the applicant.

- (a) Last service: Army.
- (b) Serial number: 0768179.
- (c) Type of papers presented: Hon. Disch.
- (d) Date of discharge or release: Sept. 25, 1945.

I also certify that to the best of my knowledge, and judgment the property covered by this application will foster and render more secure the enterprise described herein, and that business or farming conditions and other economic and geographic factors affecting the locality within which the enterprise is established will render the success thereof reasonably probable, and that the applicant is eligible under SPB Reg. 7.

Remarks:  
July 2, 1946.

/s/ [Indistinguishable.]  
SWPC District Manager.

[Endorsed]: Filed September 24, 1957.

The Court: Now, is this 95 in the same folder?  
Mr. Lavine: Yes, your Honor. The next one I offer, your Honor, is 95, which is a pink form, re-

(Testimony of James J. Galbreath.)

ferred to as Budget Bureau No. 12-R-2563, SWPC-63, dated July 2, 1946, and purports to be a certificate for veteran's priority for case No. V-33-D-33,964.

The Court: That will be then received as Exhibit 95. [90]

PLAINTIFF'S EXHIBIT No. 95

CERTIFIED FOR VETERAN'S PREFERENCE

Budget Bureau Form No. 12-R-2563

Name of Company: Harlan L. McFarland.

Number and Street: 1200 E. 19th St.

City: Bakersfield.

State: Calif.

Case Number: V-33-D-33,964.

Code Classification: 2.

Date: July 2, 1946.

Applicant's Business is: Auto Dealer.

Description: Trucks.

Quantity: 25.

[Stamped]: Certified for Veteran's Preference.

H. L. KRUEGER,

Chief, Veterans Branch;

By /s/ [Indistinguishable.]

Remarks: To be Purchased at Port Hueneme Only.

/s/ HARLAN L. McFARLAND.

[Endorsed]: Filed September 24, 1957.

(Testimony of James J. Galbreath.)

to my own other objection as to foundation. And the same will go to all your other exhibits.

Mr. Lavine: For the sake of the record, your Honor, I offer on the basis of Mr. Conron's stipulation sales catalog—

The Court: Let me have the first one, Exhibit 78.

Mr. Lavine: 78 was No. 45233.

(The document referred to was marked as Plaintiff's Exhibit 78, for identification.)

Mr. Lavine: The next one, which is marked 79, is sales catalog No. 45262, and likewise it is the same type of sales catalog.

The Court: Now, with respect to these catalogs, are [82] there any reserved objections?

Mr. Conron: I don't believe they are sufficiently founded to be evidence of sales either held on that day or as advertised. That is my only objection.

The Court: Well, are they to be marked for identification?

Mr. Lavine: Very well, your Honor, let's mark them for identification, and through a later witness I will lay a more complete foundation.

The Court: That will apply to 78?

Mr. Lavine: 78 and 79. And I now offer 80 for identification on the same basis.

Mr. Conron: What is 80?

Mr. Lavine: No. 80, your Honor is for sales 45378.

Mr. Conron: All right.

(Testimony of James J. Galbreath.)

The Court: Is that another catalog?

Mr. Lavine: Another catalog, yes.

The Court: Those three, 78, 79 and 80 will be for identification.

(The documents referred to were marked as Plaintiff's Exhibits 79 and 80, for identification.)

Mr. Lavine: I offer next No. 81, which is in all instances, until I otherwise specify, will be offered as exhibits of sales document folders containing various sales documents. This one which I just referred to, No. 81, applies [83] to the second cause of action, to transaction No. 1, which data is sales No. 45324, tag 3691, containing a certificate of William E. Schwartze within, which is identical, apparently identical to the same type of certificate we read for Mr. Dailey. That is a stamped certificate on the back of one of these sales documents, signed apparently by William E. Schwartze.

May it be stipulated, Mr. Conron, in these instances and all instances referred to this is Mr. Schwartze's signature?

Mr. Conron: Yes. In what catalog is that?

Mr. Lavine: That was catalog 45324.

That is 81, your Honor, in evidence.

The Court: Yes, in evidence.

(The document referred to was marked as Plaintiff's Exhibit No. 81, and was received in evidence.)

(Testimony of James J. Galbreath.)

Mr. Lavine: Next, No. 82, refers to transaction 2-A; sale 45324, tag 1657, certificate within. No. 83—

The Court: Just let me get that. Does that refer to item 2?

Mr. Lavine: 2-A, your Honor.

The Court: 2-A. All right, that will be Exhibit 82, in evidence.

(The document referred to was marked as Plaintiff's Exhibit No. 82, and was received in evidence.)

Mr. Lavine: Next in order is Plaintiff's Exhibit 83, [84] referring to item 2-B in the second cause of action, sale 45324, tag 1653, certificate within.

The Court: That will be received. That will be 83.

(The document referred to was marked as Plaintiff's Exhibit 83, and was received in evidence.)

Mr. Lavine: Next is 84, your Honor, for transaction No. 2-C, in the second cause of action, sale 45324, tag 1652, certificate within.

The Court: That will be 84.

(The document referred to was marked as Plaintiff's Exhibit 84, and was received in evidence.)

Mr. Lavine: 85 refers to transaction No. 2-D, in

(Testimony of James J. Galbreath.)

the second cause of action, sale 45324, tag 1662, with the certificate within. The next in order is——

The Court: It will be received as 85.

(The document referred to was marked as Plaintiff's Exhibit 85, and was received in evidence.)

Mr. Lavine: ——86, in the second cause of action, transaction No. 2-E, sale 45324, tag 1660, with a certificate within.

The Court: It will be marked and received as 86.

(The document referred to was marked as Plaintiff's Exhibit 86, and was received in evidence.)

Mr. Lavine: Next is 87, second transaction No. 3—excuse me, I mean second cause of action transaction No. 3, [85] sale 45324, tag 2242, certificate within.

The Court: 87.

(The document referred to was marked as Plaintiff's Exhibit 87, and was received in evidence.)

Mr. Lavine: The next exhibit number is 88. This is a folder containing the documents in regard to transactions 4 and 5, in the second cause of action. I have affixed a paper clip to each of the two transactions, Nos. 4 and 5, respectively, and the documents are contained in this sales folder of the Records Center. The sales number in both instances is 45233,

(Testimony of James J. Galbreath.)

and there is a certificate of Mr. Schwartz for each.

The Court: It will be received and marked Exhibit 88.

(The document referred to was marked as Plaintiff's Exhibit 88, and was received in evidence.)

Mr. Lavine: Next, No. 89, involves the second cause of action, transaction No. 6, and the sale number is 45262.

I will back track just a little bit, your Honor. Exhibit No. 89 I referred to contains all of the transaction No. 6, which I have denominated in the pleadings as items 6-A to 6-G respectively. The various tag numbers are, and I will just read them—

The Court: I was just wondering you have each—

Mr. Lavine: I have each in the same folder.

The Court: You have A to G. I thought you said.

Mr. Lavine: 6-A to 6-G. [86]

The Court: Oh, you are not including H? Item No. 6, that is A through H.

Mr. Lavine: I had H out of order. Thank you for calling it to my attention. 6-A to 6-H respectively. All of these sales are No. 45262. The tag numbers are as marked in the pleadings, respectively, for 6-A 557, with a certificate; 6-B, 558 with a certificate; 6-C is 559 with a certificate; 6-D is 560 with a certificate; 6-E is 561 with a certificate; 6-F is

(Testimony of James J. Galbreath.)

562 with a certificate; 6-G is 564 with a certificate; 6-H is 563 with a certificate.

The Court: It will be received and marked as Exhibit 89.

(The documents referred to were marked as Plaintiff's Exhibit 89, and were received in evidence.)

Mr. Lavine: 90, your Honor, refers now to sale No. 7 in the second cause of action, refers to sale 45378, tag 26. In this, your Honor, we have a different kind of certificate than the ones of the kind heretofore referred to. This form of certificate is a certificate signed by William E. Schwartze to the War Assets Administration, which states that he desires to purchase a certain vehicle, certain sale number, certain sale date, using his veteran's preference, and he refers therein to a certain veteran's number which he denominated as 10-A. I offer that as Exhibit 90, your Honor.

The Court: Exhibit 90.

(The document referred to was marked as Plaintiff's Exhibit No. 90, and was received in evidence.) [87]

Mr. Lavine: No. 91, I offer folder for the second cause of action, transaction No. 8. This is tag 2027. We have no sales catalog available for this sale, which by the way was sale 45783. However, there is a form of certificate therein identical except for reference number to the vehicle, price and so forth,

(Testimony of James J. Galbreath.)

the certificate which I read to the Court in part for Exhibit 90, the previous transaction. In addition, in the certificate signed by Mr. Schwartz, he has given his complete veteran's number as 10-A-20467.

The Court: It will be received and marked 91:

(The document referred to was marked as Plaintiff's Exhibit 91 and was received in evidence.)

Mr. Lavine: As 92, this refers to the second cause of action, transaction No. 9, sale 45783, tag 618. Likewise we have no sales catalog available for such transaction. There are two certificates of Mr. Schwartz within. First is the conventional certificate, that is with a stamp on the back signed by Mr. Schwartz, and in addition there is a second type which I read for transaction No. 90—Exhibits 90 and 91.

The Court: It will be received and marked 92.

(The document referred to was marked as Plaintiff's Exhibit 92 and was received in evidence.)

Mr. Conron: What is that tag number?

Mr. Lavine: Tag 618.

The Court: It will be received and be 92. [88]

Mr. Lavine: And 93 refers to the second cause of action, transaction No. 10, sale 45954, tag 4. Now, this has an entirely different certificate than any one previously referred to by me. This certificate consists of three pieces of paper, signed by William

(Testimony of James J. Galbreath.)

F. Schwartz, in which he lists various vehicles he would like to purchase from the War Assets Administration. In this case there has been circled in blue pencil, underlined in red, the item number, tag No. 4, which was referred to in this transaction, No. 10 in the pleadings, and he states in this certificate that Mr. Schwartz attaches his veteran's preference certificate No. 10-A-20467.

The Court: It will be received and marked Plaintiff's Exhibit 93.

(The document referred to was marked as Plaintiff's Exhibit No. 93, and was received in evidence.)

Mr. Lavine: As I stated, all the exhibits from 75 to 93 refer to the second cause of action.

I now refer your Honor to exhibits for the third cause of action, applying only to Mr. Hougham and McFarland.

As 94, I refer to a veteran's application for surplus property, dated July 2, 1946. The veteran's number is V-33-D-33964, for Harlan L. McFarland. This exhibit which I offer as 94 is attached in the Federal Records Center folder. If the Court has no objection I prefer to leave it [89] within this folder. There is another exhibit I am now going to refer to next in order also within the same folder.

The Court: Well, as I understand it, this one contains the application of Mr. McFarland for a veteran's priority certificate?

Mr. Lavine: In addition, your Honor, there is stamped in red the notation "Certified for Veteran's Preference, H. E. Krueger, Chief, Veterans

(Testimony of James J. Galbreath.)

Branch," and indistinguishable initials, conceivably Mr. Krueger's. I offer that in evidence, your Honor.

Mr. Conron: No objection.

Mr. Lavine: I next offer—

The Court: Just a minute. That is a different exhibit you are preparing to offer now? —

Mr. Lavine: Yes, your Honor.

The Court: Well, the one 94 will be received in evidence.

(The document referred to was marked as Plaintiff's Exhibit 94, and was received in evidence.)

---

**PLAINTIFF'S EXHIBIT No. 94**

Budget Bureau No. 12-R2568

Smaller War Plants Corporation

**VETERAN'S APPLICATION FOR SURPLUS PROPERTY**  
(Under SPB Reg. 7)

Case No: V-33-D-33964.

Date: July 2, 1946.

1. Applicant: Harlan L. McFarland.
2. Mailing address: 1200 E. 19th St., Bakersfield, Kern County, Calif.
3. If other application has been filed on this form, SWPC-66, indicate place and date of filing: [Blank.]
4. Trade name of enterprise: McFarland Motors.
5. Address of enterprise: 1200 E. 19th St., Bakersfield, Kern County, Calif.

(Testimony of James J. Galbreath.)

6. (a) Type of enterprise: Business.  
(b) Legal form of enterprise: Individual Proprietorship.  
(c) Description of enterprise: Auto Dealer.  
Dealer's Lic. 3116. B/E D 18417.
7. Is the enterprise already established: Yes.  
If "Yes," are you now operating it? Yes.
- • •

10. Description of items wanted:  
(a) Quantity: 25.  
(c) Description: Trucks.

[Stamped]: Certified for Veteran's Preference.

H. L. KRUEGER,  
Chief, Veterans Branch.

By /s/ [Indistinguishable.]

• • •

18. I hereby certify that all of the foregoing statements are true to the best of my knowledge and belief, that I served in the active military or naval services of the United States on, or after, September 16, 1940, and prior to the termination of the present war and was discharged or released therefrom under honorable conditions; that I am, or will be, directly or indirectly, the sole proprietor of the enterprise described herein, or, that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof; that the capital invested in the enterprise does not, or will not, exceed \$25,000 if an agricultural enterprise, or \$50,000 if a business or professional enterprise, that I am not procuring the property listed in this application for the purpose of resale.

July 2, 1946.

/s/ HARLAN L. McFARLAND,  
Signature of Applicant.

(Testimony of James J. Galbreath.)

witness, all these catalogs are official records of the Federal Records [92] Center, kept by him in the regular course of his business?

Mr. Conron: So stipulated.

The Court: Very well. Well, Mr. Galbreath, so far as the Court is concerned, you are excused from further attendance.

The Witness: Thank you.

(Witness excused.)

Mr. Lavine: The next series which I am going to offer will be numbered 101 to 150, and in each instance will be sales in catalogs referred to.

Mr. Conron: What about 100? Catalog 45350 is 99.

Mr. Lavine: That is right. Do we have catalog 45283.

Mr. Conron: We will save a number for it and see if we can find it.

Mr. Lavine: Let's reserve a number.

The Court: Let's see if you can find it there.

Mr. Lavine: We offer next as Exhibit 101, transaction No. 1-A, in the third cause of action, sale 45324, tag 1881, with a certificate therein of Mr. McFarland, the usual stamped sort of certification.

The Court: It will be received and marked Exhibit 101.

The Clerk: What about 100?

Mr. Lavine: We reserved a number for that.

The Court: They are looking for 100, as I understand it.

(The document referred to was marked as Plaintiff's Exhibit No. 101, and was received in evidence.) [93]

Mr. Lavine: 102, your Honor, is third cause of action, No. 1-D, sale 45324, tag 1882, with the usual certificate within. The mystery is solved, your Honor. I hold in my hand sales catalog 45283.

The Court: Well, we will admit in evidence 102. Now we come back to 100?

(The document referred to was marked as Plaintiff's Exhibit No. 102, and was received in evidence.)

Mr. Lavine: As Exhibit No. 100 for identification, under the same stipulation as referred to by Mr. Conron.

The Court: All right, it will be marked for identification Exhibit 100.

(The document referred to was marked as Plaintiff's Exhibit No. 100, for identification.)

Mr. Lavine: I offer as 103, third cause of action, transaction 1-C, sale No. 45324, tag 1883, with the usual certificate within.

The Court: It will be marked 103.

(The document referred to was marked as Plaintiff's Exhibit No. 103, and was received in evidence.)

Mr. Lavine: I offer as 104, third cause of action, No. 1-D, sale 45324, tag 1884, with the usual certificate within.

(Testimony of James J. Galbreath.)

Mr. Lavine: I offer next as Exhibit No. 96, a statement of Harlan L. McFarland, dated May 6, 1947, made to the Federal Bureau of Investigation, and it purports to bear the signature of Harlan L. McFarland. May it be stipulated, Mr. Conron, that is the signature of Mr. McFarland?

Mr. Conron: So stipulated. It may be received.

The Court: It will be received and marked 96.

(The document referred to was marked as Plaintiff's Exhibit No. 96, and was received in evidence.)

PLAINTIFF'S EXHIBIT No. 96

46-1303-1A7

May 6, 1947

Bakersfield, Cal.

I, Harlan L. McFarland, hereby make the following voluntary statement to Robert J. Emonts whom I know to be a Special Agent of the Federal Bureau of Investigation. No threats or promises have been used to cause me to make this statement and I realize that it may be used in a court of law.

I was born in Iron River, Michigan, on July 25, 1917. I have resided in Bakersfield, California, since 1918 and presently reside at 2922 Elmwood Ave., Bakersfield. My mother, Diana McFarland, and my brother, Jack McFarland, organized McFarland Motors in 1933 to deal in new and used automobiles. I replaced my brother, Jack, after his death in 1936. I entered the Army on July 24, 1942.

(Testimony of James J. Galbreath.)

Plaintiff's Exhibit No. 96—(Continued)

and was discharged on May 22, 1945. During the War my mother maintained the necessary licenses for the business but it remained inactive. Upon my return from the Army I attempted to renew my contacts in the passenger automobile business but found it impossible to obtain any cars. About this time I contacted Ben Hougham, an old family friend, who had been dealing in Army Surplus trucks during the War and before my return. I was lamenting the fact that it was impossible to get back into the used passenger car business. Hougham said he thought I ought to buy and sell surplus army equipment. As a result of this suggestion I went out and tried to obtain financing to buy some of this equipment but was unable to do so. I again talked to Hougham at which time he made me the following proposition. Inasmuch as I had previously wholesaled cars through Hougham although he had no financial interest in my business nor I in his, he suggested that if I would purchase Army Surplus Automotive equipment he would supply all the money for the purchases. This began in November, 1945, at which time no veterans' priorities were available for resale items. He was doing me a favor by putting up the money for me to buy merchandise and I was doing him a favor by acting as his buyer at these sales. Around March, 1946, I heard that veterans could be certified to obtain equipment for resale which would give them the best selections at sales before the dealers could take their choice.

(Testimony of James J. Galbreath.)

Plaintiff's Exhibit No. 96—(Continued)

I went to the War Assets Administration Veterans Certification Office in San Francisco and was certified for 40 vehicles for resale. I do not recall the exact figures but I believe that I obtained approximately 25 vehicles on this certification at various sales throughout 1946. All money for these purchases was supplied by Hougham under our original agreement whereby he made all necessary repairs to place the merchandise in salable condition and paid me a commission only on the sale of those items which I actually retailed. I believe that I sold about half of these items either off of his lot or mine and the other half were sold by him. At no time did Hougham offer to pay me any money for the use of my priority and our original agreement continued whereby my only compensation was the commissions I was paid on the trucks I retailed. Some time in the summer of 1946 I went to Port Hueneme, Cal., to attend a W.A.A. sale and learned there that I would have to be recertified in the Los Angeles area since I still held priorities issued in San Francisco. I was certified immediately at Port Hueneme for 25 vehicles and obtained most of them that day including bomb carrying trailers, and Rossman fluid tanks. A couple of months later I returned to Port Hueneme and used the remainder of this priority to purchase additional bomb carrying trailers, Rossman tanks, and one Oilfield International truck. The money for all of these purchases on my veteran's priority was supplied by Hougham.

(Testimony of James J. Galbreath.)

**Plaintiff's Exhibit No. 96—(Continued)**

Some of these items were then sold by me and I was paid commissions on their sale by Hougham but no additional compensation was paid to me. On some of the trips to sales he paid the expenses and on some I paid them. On one particular occasion when I went to San Francisco to obtain a 2½ ton GMC truck which I had intended to resell myself, he asked for it to fill an order that he had for that type of truck and paid my hotel bill and train fare for the trip.

The only times I have ever been certified for a veteran's priority for the purchase of surplus W.A.A. equipment are the above two times at Port Hueneme and San Francisco, respectively, which were both certifications for the resale of equipment to be purchased plus one certification for a jeep for personal use dated 7-29-46 at San Francisco which priority has never been used and is still in my possession.

With regard to my signing the statement in my Port Hueneme application to the effect that I would use the property applied for in connection with the enterprise stated, I wish to state that I did not feel that Hougham's supplying the money for me was any different than borrowing it from some finance company except that it saved me interest and Hougham's repair shop served as a logical and cheap place for me to have the items put in salable condition.

I have read the above statement consisting of this

(Testimony of James J. Galbreath.)

Plaintiff's Exhibit No. 96—(Continued)  
and one preceeding page and everything contained  
therein is true and correct.

/s/ HARLAN L. McFARLAND.

Witnessed:

Subscribed and sworn to before me, this 6th day  
of May, 1947.

/s/ ROBERT J. EMONTS,  
Spec. Agt. FBI, Los Angeles.

[Endorsed]: Filed September 24, 1957.

Mr. Lavine: I offer as 97, your Honor, a second  
veteran's application for surplus property. This  
bears the number 10-A-24063, dated March 20, 1946,  
of Harlan L. McFarland, and may it be stipu-  
lated—

The Court: The other application was July 2,  
1946?

Mr. Lavine: That is correct, your Honor. This  
is prior thereto. May it be stipulated this is the sig-  
nature of Harlan L. McFarland?

Mr. Conron: So stipulated.

Mr. Lavine: And it bears on this the stamp that  
certain purchases, the last two items, have been  
completed. I offer that as 97, your Honor.

The Court: It will be received as 97.

(The document referred to was marked as  
Plaintiff's Exhibit No. 97, and was received in  
evidence.)

Corporation  
 Form Approved  
 Budget Bureau No. 27-100-10  
 10 A-24063  
 3-20-46

1. Applicant  
 H. E. Adams  
 1500 - EAST - 10th St  
 Bakersfield  
 Calif

2. Mailing address  
 1500 - EAST - 10th St  
 Bakersfield  
 Calif

3. Name of company  
 H. E. Adams  
 1500 - EAST - 10th St  
 Bakersfield  
 Calif

4. Name of company  
 H. E. Adams  
 1500 - EAST - 10th St  
 Bakersfield  
 Calif

5. Name of company  
 H. E. Adams  
 1500 - EAST - 10th St  
 Bakersfield  
 Calif

6. Name of company  
 H. E. Adams  
 1500 - EAST - 10th St  
 Bakersfield  
 Calif

7. Name of company  
 H. E. Adams  
 1500 - EAST - 10th St  
 Bakersfield  
 Calif

8. Name of company  
 H. E. Adams  
 1500 - EAST - 10th St  
 Bakersfield  
 Calif

9. Name of company  
 H. E. Adams  
 1500 - EAST - 10th St  
 Bakersfield  
 Calif

10. Description of items wanted

| Quantity | Unit | Description                          | To inspection desired (Yes or No) for each item | Serial inspection date |
|----------|------|--------------------------------------|---|------------------------|
|          |      | (Enter items in order of preference) |   |                        |

Form 100-1 (1-11-44)

**IF SWPC CREDIT IS NOT REQUIRED, DO NOT FILL IN THESE 12 THROUGH 17**

12. Name and address of each bank with which you are now a depositor.

(a) \_\_\_\_\_

(b) \_\_\_\_\_

13. Name and address of each bank to which you are indebted.

(a) \_\_\_\_\_

(b) \_\_\_\_\_

14. Credit references (trade or charge accounts). (Give names and addresses)

(a) \_\_\_\_\_

(b) \_\_\_\_\_

15. Personal references. (Give names and addresses)

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

16. Name(s) of other person(s) with proprietary interest connected with this enterprise. (Give name(s) and address(es) and percent of interest)

\_\_\_\_\_

17. Balance Sheet of Enterprise, as of \_\_\_\_\_ Date \_\_\_\_\_

|                                  |          |                                       |          |
|----------------------------------|----------|---------------------------------------|----------|
| <b>Current Assets</b>            |          | <b>Current Liabilities</b>            |          |
| Cash.....                        | \$ _____ | Accounts Payable.....                 | \$ _____ |
| Accounts Receivable.....         | _____    | Notes Payable.....                    | _____    |
| Notes Receivable.....            | _____    | Other Liabilities.....                | _____    |
| Inventory.....                   | _____    |                                       |          |
| Other Assets.....                | _____    |                                       |          |
| <b>Total Current Assets.....</b> | _____    | <b>Total Current Liabilities.....</b> | _____    |
| <b>Fixed and Other Assets</b>    |          | <b>Other Liabilities</b>              |          |
| Land.....                        | _____    | Mortgage.....                         | _____    |
| Buildings.....                   | _____    | Reserve for Depreciation....          | _____    |
| Machinery and Equipment....      | _____    |                                       |          |
| Other Assets.....                | _____    | Net Worth.....                        | _____    |
| <b>TOTAL ASSETS.....</b>         | _____    | <b>TOTAL LIABILITIES.....</b>         | _____    |

18. I hereby certify that all of the foregoing statements are true to the best of my knowledge and belief, that I served in the active military or naval services of the United States on, or after, September 16, 1940, and prior to the termination of the present war and was discharged or released therefrom under honorable conditions; that I am, or will be, directly or indirectly, the sole proprietor of the enterprise described herein, or, that an person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 percent of either the capital invested in the enterprise or of the gross profits or income thereof; that the capital invested in the enterprise does not, or will not, exceed \$25,000 if an agricultural enterprise, or \$50,000 if a business or professional enterprise, that I am not procuring the property listed in this application for the purpose of resale; and that said property is to be used in and as part of the enterprise described herein.

March 20 - 46 \_\_\_\_\_

Date Signature of Applicant

IT IS A CRIMINAL OFFENSE, AND A FELONY, TO MAKE A WILLFULLY FALSE STATEMENT OR CLAIM, DIRECTLY OR BY ANY TRICK OR DECEIT, TO ANY GOVERNMENT AGENCY, AS TO ANY MATTER WITHIN ITS JURISDICTION. (Sec. 80A, U.S. Criminal Code).

(Testimony of James J. Galbreath.)

Mr. Lavine (After showing to counsel): I next offer a [91] folder of the Federal Records Center, containing miscellaneous documents, all of which apply to Mr. McFarland, and they refer to transactions applicable to both of the veteran's applications which I previously referred to in the Exhibits 94 and 97 respectively.

Mr. Conron: No objection.

The Court: It will be marked Exhibit 98.

(The document referred to was marked as Plaintiff's Exhibit No. 98, and was received in evidence.)

Mr. Lavine: I offer as Exhibit No. 99 sales catalog 45350. May we have the same stipulation, for identification.

Mr. Conron: For identification.

Mr. Lavine: Offer it for identification, your Honor.

The Court: It will be marked for identification as Exhibit 99.

(The document referred to was marked as Plaintiff's Exhibit No. 99, for identification.)

Mr. Lavine: Incidentally, your Honor, I have no further questions to ask of this witness, and I ask that Mr. Galbreath be excused.

Mr. Conron: I have no cross-examination. He may be excused.

Mr. Lavine: Just for clarity, do I understand, Mr. Conron, so far as the foundation laid by this

The Court: 104 is received.

(The document referred to was marked as Plaintiff's Exhibit No. 104, and was received in evidence.) [94].

Mr. Lavine: No. 105, which was sale 45324, tag 1879, usual certificate within.

The Court: It will be received and marked 105.

(The document referred to was marked as Plaintiff's Exhibit No. 105, and was received in evidence.)

Mr. Lavine: If we can save any time, your Honor, also on this transaction No. 1 we go up to No. 1-I., and in each case the sale number is the sale, and the same certificate within, and with your Honor's permission I would like to offer these in evidence, referring only to the tag numbers, which is the only item which differs. May I, your Honor?

The Court: Yes.

Mr. Lavine: 106, transaction 1-F, tag 1877.

The Clerk: What was 105?

Mr. Lavine: 105 was 1-E, tag 1879.

(The document referred to was marked as Plaintiff's Exhibit No. 106, and was received in evidence.)

The Court: Just a minute. Did you get 105 marked, Mr. Eiland?

Mr. Lavine: No, you did not.  
107 is transaction 1-G—

The Court: Well, let's see now, 106, you have that marked?

The Clerk: Yes, I do.

Mr. Lavine: No. 107 is tag 1878.

The Court: All right. [95]

Mr. Lavine: 1-H is 108, tag 1880.

The Court: That is 108.

Mr. Lavine: Yes, your Honor. 109 is No. 1-I, tag 1887.

The Court: So marked and received, 109.

(The documents referred to were marked as Plaintiff's Exhibits 107, 108 and 109 respectively, and received in evidence.)

Mr. Lavine: 110 is No. 1-J, tag 1888.

The Court: It will be marked and received.

(The document referred to was marked as Plaintiff's Exhibit No. 110, and was received in evidence.)

Mr. Lavine: No. 111 is No. 1-K, tag 1885.

The Court: Received.

(The document referred to was marked as Plaintiff's Exhibit No. 111, and was received in evidence.)

Mr. Lavine: 1-L is 112, tag 1886.

(The document referred to was marked as Plaintiff's Exhibit No. 112, and was received in evidence.)

Mr. Lavine: Now, for transaction 2-A, we still have sale 45324.

The Court: I think, Mr. Lavine, that we are

going to adjourn for the day. We will adjourn until tomorrow morning at ten o'clock.

(Thereupon at 4:15 o'clock p.m. a recess was taken until 10:00 a.m., September 25, 1957.)

September 25, 1957, 10:00 A.M.

The Court: Are you ready, gentlemen?

Mr. Lavine: Ready, your Honor.

Your Honor, before I introduce the remainder of the Plaintiff's Exhibits, I would like to call a witness a little out of order, Mr. Karl Koenig. I desire to have his testimony finished, if possible, before noon, that is why I would like to call him at this time.

The Court: Do you have any objection?

Mr. Conron: None at all.

The Court: Very well.

Mr. Lavine: Will the Clerk call Karl Koenig?

**KARL F. KOENIG**

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name.

The Witness: Karl F. Koenig.

The Clerk: Have that seat there.

**Direct Examination**

By Mr. Lavine:

Q. Mr. Koenig, what is your present occupation or job?

A. I am chief of the sales branch of the Federal Supply Service Utilization for Profit, Division of the General Services Administration. [97]

(Testimony of Karl F. Koenig.)

Q. During the years 1945, '46 and '47, what was your job?

A. I was the surplus property disposal officer, but it had various agencies at that time. In 1946, I believe the date was March 26th, the agency then known as War Assets Administration, took over the surplus property disposal of the previous agencies that had had it.

Q. What was your title in the War Assets Administration?

A. I was administrative officer, for a while, and then I was assistant to the deputy regional director for surplus disposal.

Q. Where was your office located?

A. 30 Van Ness Avenue.

Q. And in what city? A. San Francisco.

Q. And what area did your office encompass?

A. I believe at that time Northern California, Hawaii, Nevada at that time. There was a split in the office at the time they established the Los Angeles regional office, which encompassed lower California and Arizona.

Q. Do you have any familiarity with the disposal of used government vehicles of various types?

A. Yes, I do.

Q. What is your experience along that line?

A. Now or then?

Q. At that time. Unless I specify to the contrary, my [98] questions will apply to the years 1945, '46 and '47.

A. Well, I entered the surplus disposal responsi-

(Testimony of Karl F. Koenig.)

bilities in approximately July of 1946, but I was with the agency organization also prior to that time, since 1944. In 1946, at the time I was concerned with disposal of surplus property, I was assistant to the deputy regional director for surplus property disposal, and under him there were approximately 13 marketing specialists, so-called, in which people dealt in various types of surplus property, including automotive, textiles, hardware, medical supplies, and so forth.

Q. What was your contact in particular with automotive vehicles in particular?

A. In my role of assisting the deputy district director most of the decisions that were coming across his desk were policy, planning, promotion of sales of surplus property, and so forth, and we had knowledge of all offerings of surplus property in the various commodity ranges.

Q. As I understand, your duties in the field of disposal and/or sales were of surplus property, is that correct?

A. That is correct.

Q. I take it your office did not have anything to do with the issuance of veterans' preferences or things of that sort?

A. No, we did not.

Q. Could you describe for us how, in general, the plan [99] of disposal of vehicles was carried on in the California area?

A. We received inventories from various federal agencies, mainly the military, of properties that were surplus to their needs, and it was our

(Testimony of Karl F. Koenig.)

responsibility to dispose of that surplus. We took accountability, set up inventories, had a crew of inspectors inspect the merchandise, and then the inventories were turned over to the particular marketing specialist, and in the case of automotive vehicles it was up to the marketing specialist to schedule sales of various types in order to accomplish the sales objective.

Q. What legal criteria, if any, did you use in setting up priorities of sales?

A. If I recall correctly, at that time we had various types of priorities, the first and foremost being the needs of other federal agencies. Then we came down to state and local governments, number two priority. Third, we had veterans for their own personal use. If I remember correctly, the fourth one was veterans who desired to go into business using surplus property; and fifth and last was the general public.

Q. Now, let's say we have a stock of vehicles reported to you and ready to be set up for sale. What in general is done in circularizing the facts to the public and the other categories you just mentioned?

A. Normally, the easiest way of announcing and [100] promulgating the sale would be to get out a written sales announcement, which could take the form of a brochure, or asking for sealed bids, including newspaper advertising if it was going to be an auction sale.

7. In the enterprises already established Yes If "Yes", are you now operating as? Yes  
How and when do you plan to start your operations if you are starting a new enterprise or buying into an exist-  
ing enterprise? Yes

8. Size of enterprise.  
Specify estimated number of men concerned.

9. What experience, training, and/or education have you had which you believe assists the conduct of this enterprise? Auto Sales 2/4/65 1933

10. Description of items tested.

[illegible]

Is the purchase of any of the items listed above?                      per or no

Information requested in Items 13 through 17 following.

16. I hereby certify that all of the foregoing statements are true to the best of my knowledge and belief, that I served in the active military or naval services of the United States on, or after, September 16, 1940, and prior to the termination of the present war and was discharged or released therefrom under honorable conditions; that I am, or will be, directly or indirectly, the sole proprietor of the enterprise described herein, or, that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 percent of either the capital invested in the enterprise or of the gross profits or income thereof; that the capital invested in the enterprise does not, or will not, exceed \$25,000 if an agricultural enterprise, or \$50,000 if a business or professional enterprise, that I am not procuring the property listed in this application for the purpose of resale; and that said property is to be used in and as part of the enterprise described herein.

March 20 - 46

Date

[Signature]  
Signature of Applicant

IT IS A CRIMINAL OFFENSE, AND A FELONY, TO MAKE A WILLFULLY FALSE STATEMENT OR CLAIM, DIRECTLY OR BY ANY TRICE OR DECEIT, TO ANY GOVERNMENT AGENCY, AS TO ANY MATTER WITHIN ITS JURISDICTION. (Sec. 96A, U.S. Criminal Code). SEVERE CIVIL PENALTIES ARE ALSO PROVIDED FOR THE FRAUDULENT OBTAINING OF SURPLUS PROPERTY. (Surplus Property Act, 42 U.S.C. 961).

**ACTION TAKEN BY GOVERNMENT OFFICIALS (Not for Applicant's Use)**

19. I certify that the following information appeared on the discharge papers or a certificate of satisfactory completion of active duty shown me by the applicant.

(a) Last service Army

(b) Serial number 0768179

(c) Type of papers presented Discharge order

(d) Date of discharge or release June 20 - 46

Discharge or Release: (Check one)

Under honorable conditions ☒

Other ☐

I also certify that to the best of my knowledge and judgment the property covered by this application will or will not factor and render more secure the enterprise described herein, and that business or farming conditions and other economic and geographic factors affecting the locality within which the enterprise is established will or will not render the success thereof reasonably probable, and that the applicant is or is not eligible under SPS Reg. 7.

Remarks:

Remarks:

Member of LAA Committee

Date

Street

City and State

County

State

SPS District Manager

Date

District office

20. Action by Loan Agent

SPS Loan Agent

Date

21. I approve this application for the acquisition of surplus property.

Remarks:

[Signature]  
SPS District Manager

3/20/46  
Date

(Testimony of Karl F. Koenig.)

Q. Apart from the newspaper advertising, who would normally receive the announcement of such proposed sale?

A. Well, there were various types of priority claimants, but we had several different mailing lists, including mailing lists of veterans, and also of dealers in the general competitive automotive field.

Q. In the categories 3, 4 and 5, you mentioned, veterans for personal use, veterans for resale, and the general public, what plan in general was used in these sales for giving priority and yet allowing all groups mentioned to have a crack at the vehicles?

A. We established priorities and also mailing lists on the basis of application by the individual buyers, who would fill out a form announcing that they were interested in purchasing equipment, and then they were put on a mailing list and also a waiting list, and normally the veterans who applied first got first choice; it was in order of sequence of their application.

Q. Were sales catalogs published by the War Assets Administration in this connection?

A. Yes, there were. [101]

Q. What was the use of the catalogs?

A. To bring to the attention of the potential interested buyer the existence of surplus together with sufficient description and the location of the vehicles to permit them to inspect and possibly buy.

Q. I show you Plaintiff's Exhibit 6, which consists of sales catalog labeled 45968, and ask you, Mr.

(Testimony of Karl F. Koenig.)

Koenig, to examine this and tell us what this document is for?

A. This looks like a sales announcement put out by the War Assets Administration, in order to bring to the attention of veterans only an opportunity to buy jeeps and motorcycles and scooters located, I think it is Nevada—no, several locations.

Q. Now, does this document set forth the rules and priorities for such proposed sale?

The Court: Mr. Lavine, would you speak a little louder? Would you read the question? Sometimes you get close to the witness and you drop your voice.

(Question read.)

Mr. Conron: I think, your Honor, the document speaks for itself. The contents are the best evidence.

The Court: I think that is true. Of course, I would like to avoid having to go through the entire instrument to find out what is in it.

Mr. Lavine: I would like to make a further observation, [102] your Honor. One of the objections Mr. Conron made was lack of foundation. I can only use this witness to further lay my foundation.

The Court: Well, I think the instrument speaks for itself but I will overrule the objection. Do you recall the question?

A. Part of the announcement contains the elements of priority. I would like to read, if I may, from this, one line: "Eligible are veterans of World War II, who hold priority certificates for the items listed in this folder." "Awards of the vehicles

(Testimony of Karl F. Koenig.)

ordered will be made on September 30, according to case number and date of certification. If no award is made to you, your veterans priority certificate will be returned for use at future sales."

The Court: Just a minute, on what page does that appear?

The Witness: On the fly leaf.

Mr. Lavine: The witness is looking at the first or cover page of this document.

Q. What has been your experience, if any, Mr. Koenig, in relation to the announcements made on these documents with the actual conduct of a particular sale?

A. If I understand your question correctly, the sales on this particular document were made to veterans only.

Q. Do you recall any instance in which there was a substantial departure from the terms and conditions as outlined in the circular? [103]

Mr. Conron: I think that is immaterial.

The Court: I think it is.

Mr. Lavine: Very well, your Honor. I will withdraw the question.

Q. I next show you Plaintiff's Exhibit for identification 4, sales catalog No. 46069.

Mr. Conron: What is the exhibit number?

Mr. Lavine: No. 4.

Q. And I ask you to examine this catalog.

A. Yes.

Q. Mr. Koenig, having examined that document, could you tell us what is the purpose of such catalog?

(Testimony of Karl F. Koenig.)

A. This is a spot sale of motor vehicles to dealers without priority certification.

Q. Do I understand veterans and non-veterans may attend such sale and purchase on an equal basis?

A. That is correct, veterans can compete with automotive dealers.

The Court: In other words, that would come within the class 5, the general public.

The Witness: That is correct.

The Court: Anybody in and above class 5 would have an opportunity to bid?

The Witness: Veterans as well as dealers.

The Court: Yes, everybody. [104]

Q. (By Mr. Lavine): Is this a fixed price or a bid price sale, can you tell?

A. This is a fixed price sale first. If any items were not sold at the fixed prices, they would be later sold by bid.

Q. What do you mean by the term "fixed price sale," Mr. Koenig?

A. It was a yard stick that was developed based on a government inspection of the vehicles, the market value of any accessories on the vehicle, together with the arrival at a fixed price of a certain percentage of cost, which I believe if I remember now could not exceed the established ceiling price at that time.

Q. I next show you Plaintiff's Exhibit 3 for identification, catalog No. 45324. Would you examine that, please?

(Testimony of Karl F. Koenig.)

A. This is, I believe, what they call a site sale——

The Court: A site?

The Witness: S-i-t-e—which was held at Port Hueneme, California, and contained approximately fifty-four, or fifty-five hundred new trucks and trailers, so described, valued at \$14,000.000, and also at fixed price which was indicated for each vehicle for veterans only.

Mr. Lavine: At this point I would like to say to the Court and counsel, for the convenience of all concerned I [105] have done the following: I have put paper clips on the pages in these various catalogs, so on a partial or complete basis, anyone wishing to check may check the various tag numbers and the various transactions against the appropriate catalog and find the location of the particular vehicle in question.

Q. Do I understand, Mr. Koenig, this apparently was for those in categories for priorities three and four veterans only?

A. That is correct, veterans only.

Q. I next show you Plaintiff's Exhibit 79 for identification, which is sales catalog 45262.

The Court: The exhibit number?

Mr. Lavine: 79 for identification, your Honor.

Q. And ask you to examine this document.

A. This is a sale with a sequence.

Q. I haven't put a question.

A. I am sorry.

Q. What is this document that you see?

A. This is an announcement of a fixed price sale

(Testimony of Karl F. Koenig.)

of motor vehicles with various steps of priority, starting with federal agencies first, second state and local government and tax-supported institutions, third veterans, fourth dealers.

Q. How were the priority sales condition in relation to time, according to this catalog? [106]

A. Dates applicable to each priority group are indicated to occur on certain dates, succeeding each other in accordance with the priority number.

Q. Supposing I were to show you a sales document dated March 21st, for example, of this year. What would that indicate to you in relation to the priority, based on such sales document?

A. I couldn't answer definitely. I presume you mean that given a sale to a state or local government, you would have to disregard the date indicated for the property sold.

Mr. Conron: Mr. Koenig, would you speak up so I can hear you?

The Witness: The question was only hypothetical.

Mr. Lavine: The question was hypothetical. Let me put it again.

The Court: You withdraw the question?

Mr. Lavine: Yes.

Q. Let me put the following hypothetical question to you: Let us suppose that I show you a sales document of War Assets Administration, which shows the sale to have been effected, the actual sale, not necessarily the drawing up of papers, on March 21st of this year. Supposing I would then ask you from the looks of this document I have showed you,

(Testimony of Karl F. Koenig.)

what priority did the purchaser have. Do you have an opinion as to that subject?

A. If the sales document could be identified as [107] appertaining to this catalog, and it was dated between March 21st and March 22nd, I would be concluding that it was a sale to veterans on this particular catalog for the particular vehicles listed on the sale.

Q. I will add to the question that the sale document would contain a reference to this sales catalog and this sale; would your answer be the same?

A. Yes.

Q. I next show you Plaintiff's Exhibit 80 for identification, that is the sales catalog 45378. I ask you to examine this document, if you will. What type of sale is represented by this document, Mr. Koenig?

A. This is a mail order sale of vehicles located in Nevada for veterans holding priority certificates only.

Q. Was it to be conducted during any particular dates?

A. Yes, the vehicles were set aside in accordance with the announcement, and were to be filled by mail, the veteran was to indicate his choice of vehicle, identify the tag number, and submit his priority certificate form 63 or 73, with his order, which forms would be returned to him for use at future sales.

Q. Now, Mr. Koenig, do you have any knowledge on whether veterans from any area, qualified veterans, could apply for such vehicles, or did they have

(Testimony of Karl F. Koenig.)

to come from a specific region, Northern California, or Southern California? [108]

A. If my memory serves me correctly there were no restrictions, veterans could buy nationally.

Q. Was that true generally of sales to veterans, to your knowledge?

Mr. Conron: I didn't hear the answer to that.

Mr. Lavine: There was no answer yet.

Mr. Conron: I am sorry.

The Witness: The question was in the past tense.

Q. (By Mr. Lavine): I am referring now, at all times, Mr. Koenig, to sales of War Assets Administration during 1946 and 1947.

A. To my best recollection there was no restriction as to what area of the United States a veteran could buy.

Q. I next show you Plaintiff's Exhibit No. 100, for identification, sales catalog No. 45283. I ask you to examine that, please. What was the use of this particular document?

A. This was similar to one previously described. It is an announcement of a sale by fixed price, with various priority claimants, becoming effective on certain dates.

Q. What were the dates allocated for veterans of World War II?

A. April 4th and April 5th, 1946.

Q. I put a hypothetical question to you. A moment or so ago, Mr. Koenig, as to whether given a certain sales document and a reference to this particular manual and a [109] particular date of April

(Testimony of Karl F. Koenig.)

4th of that year, would you then have an opinion as to what priority that particular purchaser had?

A. Well, he would have third priority here as listed, as a veteran of World War II.

Q. I next show you Plaintiff's Exhibit 99 which is a sales catalog 45350, and I ask you to examine that. Would you describe what that document is for us?

A. This is similar to the previously described sale, another sale.

Q. And what type of sale was that?

A. It was a fixed price sale of motor vehicles at various locations with various priority claimants and dates specified.

Q. What dates are set aside, if any, for veterans of World War II?

A. May 9th, 10th and May 13th.

Q. I next show you Plaintiff's Exhibit No. 78, sales catalog No. 45233, Exhibit 78. I ask you to examine that.

The Court: What was the exhibit number?

Mr. Lavine: 78, your Honor.

Q. Would you describe what that document is for?

A. This again is similar to the previously described announcement.

Q. That is to say, for what type of sale?

A. Fixed price sale of motor vehicles, designed to satisfy certain priority claimants on specified dates. [110]

(Testimony of Karl F. Koenig.)

Q. Is there any date set for veterans of World War II? A. February 28th to March 1st 1946.

Q. Incidentally, Mr. Koenig, what do we mean by the term "tag number"?

A. When an inspector went out to inspect a vehicle he had to make an inspection report, and he usually assigned a tag number to the vehicle to indicate that the inspection had been completed, and that identified the vehicle.

Q. So a tag number is one method of finding the item in a given catalog?

A. That is correct. There were certain sales that were being held over a period of time. Some of the vehicles were not inspected and marked for sale. As soon as a vehicle was marked for sale, and given a tag, that tag could be identified from a catalog, showing a prospective purchaser the site so he would be able to determine that was the vehicle described in the folder.

Q. I next show you Plaintiff's Exhibit 7 for identification, catalog 45954, and I ask you to examine that. Would you describe what type of sale is represented by such document?

A. This is an announcement of a sale of used trucks, trailers and buses being offered to certified veterans of World War II only. It is a mail order sale. [111]

Q. Is the nature of the sale similar to the other mail order sales we discussed a few minutes ago?

A. A mail order sale, that is correct, and there's

(Testimony of Karl F. Koenig.)

a dead line of arrival of the receipt of the order, on or before October 7, 1946.

Mr. Lavine: Your Honor, I offer into evidence Plaintiff's Exhibits Nos. 7, 78, 99, 100, 80, 79, 3, 4 and 6.

Mr. Conron: To which I object as not sufficient foundation has been laid as of now.

The Court: Well, I will overrule the objection. The documents will be received and given the same numbers in evidence as for identification.

(The documents referred to, heretofore marked for identification, were received as Plaintiff's Exhibits 3, 4, 6, 7, 78, 79, 80, 99 and 100 respectively.)

Q. (By Mr. Lavine): Mr. Koenig, I have taken several sales documents that have been introduced into evidence, the first one I have in my hand is Plaintiff's Exhibit 73 in evidence, referring to the first cause of action, transaction 12. Would you examine this document, this set of documents and describe to us what the use of these documents was in the conduct of these sales, these veterans sales? Would you describe it document by document? First of all, on the right hand side of this folder is a document entitled "Sales Document-Copy No. 2 Machine Records, Page 1 of 1 pages." What is this document [112] I show you?

A. This is a copy of the sales document that was used to commit the sale to the purchaser.

(Testimony of Karl F. Koenig.)

Q. We just call it the sales document, is that correct?

A. That is labeled as copy No. 2, and is designed to be received by the machine records room and they punched the IBM card which was kept by them.

Q. Underneath the document—

Mr. Conron: Mr. Lavine, I wonder if we couldn't have the record designate these various papers in the folder as A, B and C for the record.

Mr. Lavine: Very well. Your Honor, may the top right hand document be designated 73-A?

Mr. Conron: That is what we were discussing.

Mr. Lavine: Yes.

The Court: Will you mark 73-A?

Mr. Lavine: I am appending in the upper right hand margin in my own handwriting the numerals 73-A.

I next refer for identification to a plain white piece of paper with some typing and printing, and stamping thereon—with the Court's permission I will write in the upper right corner the numbers and letter 73-B.

Q. What is this piece of paper?

A. This appears to be an exact copy of the first top piece of paper, which was on WAA Form 1B, and that particular [113] piece of paper happens to be the second copy of the master pre-carbon inserted form WAA-1.

The Court: What do you mean by WAA?

The Witness: Designation abbreviating War Assets Administration.

(Testimony of Karl F. Koenig.)

Mr. Lavine: I now go over to the left hand side of the folder, and to a page on top, which I now mark 73-B—

The Court: 73-B? Wouldn't that be 73-C?

Mr. Lavine: Excuse me, your Honor. Strike out 73-B. I will write on top of that 73-C.

Q. What is this document?

A. This is indicated to be WAA Form 1-C, copy No. 5, delivery order, which is designed to obtain a signature on the part of the purchaser as a receipt for the property involved.

Q. I notice there is a stamp on there marked "Completed Traffic Div'n" with some more material. What is that stamp?

A. In some cases in the sale of special property, the property was shipped and the traffic division entered into it, in order to arrange for railroad cars or to otherwise effect shipment, but in case of automotive vehicles the purchaser usually came and took possession himself and that traffic stamp was probably placed on there to show that it had been cleared by him and that delivery had been completed.

Q. I notice in the bottom of the certificate there is [114] apparently an indelible pencil signature which purports to be Owen N. Dailey. What would that signature be for? Incidentally it is signed Owen N. Dailey by W. A. Schwartze. What would such signature be for?

A. I believe that it would be documentary, shall we say, evidence that the purchaser had obtained delivery of that particular vehicle.

Q. Sort of a receipt for the merchandise?

(Testimony of Karl F. Koenig.)

A. Yes.

Q. Now, below such piece of paper, also on the left hand side, is a blue form which I will designate 79-D.

The Court: No, 73, wouldn't it be?

Mr. Lavine: Crossing out 79-D and writing in 73-D, which is entitled a "Bill of Sale." What is that document?

A. If my memory serves me correctly, I believe this is a form utilized to transfer title from the previous owner, I mean, from the government to the new purchaser, and this was submitted to the State Department of Motor Vehicles in order to obtain an ownership certificate.

Q. I now hold in my hand Plaintiff's Exhibit No. 112, looking through this folder there are a set of documents on the right hand side. The first document, which I will mark 112-A, appears to be also the "inventory unit copy" No. 2. That is the type of document you have previously described. Below that is a document which I will mark 112-B, which I [115] ask you to describe.

The Court: If you need a magnifying glass, I have one.

The Witness: This is sufficient. I think I can identify this document. This was a predecessor to the sales document that I previously described, which was indicated by the fact that they struck out the words "Department of Commerce."

That used to be the disposal agency, to become War Assets Administration, and possibly was utilized before the new forms came out, or they in-

(Testimony of Karl F. Koenig.)

structed the sales department to use up the forms that had been in existence.

Q. (By Mr. Lavine): I notice thereon a stamp marked "Paid July 2, 1946, War Assets Administration" and certain items below that. What is such a stamp for?

A. That was to notify the people that were responsible for accountability and delivery that the transaction was paid for and that delivery could be made.

Q. I am now turning over to the reverse side of 112-B, and show you the reverse side. I note there is a stamp "Veterans Preference" which states:

"The contracting officer whose signature appears below certified that this contract is awarded to a veteran exercising preference rights in accordance with Surplus Property Administration Regulation 7. The purchaser agrees to buy the [116] property listed herein in accordance with the attached sales conditions and any modifications thereof which are attached to and made a part hereof," and a signature here apparently of Harlan L. McFarland and below that there is "accepted by the government" by F. O'Brien, I believe.

What is this certificate for?

A. I believe it would validate the sale as having been executed under a veteran's priority.

Q. The next document in this set is a blue Bill of Sale, which I will mark 12-C, which appears—

(Testimony of Karl F. Koenig.)

The Court: 112.

Mr. Lavine: 112-C, which apparently is the same as you have just described. Below that is a blue form which I will mark 112-D, entitled copy 5. What is this blue form?

A. This appears to be a copy of sales document with a designation to the purchaser that he should present this to the property custodian at the site, which is Port Hueneme, and is a record of delivery having been made to the purchaser, supported by a shipping document executed by Port Hueneme.

Q. Presumably then the purchaser gets sufficient copies of these sales documents so he can surrender one to the place where he is picking up the vehicle, and retain one for his own file; is that your understanding?

A. That is correct. [117]

Q. And the copy he retains for his own file would not appear in these government files, would they?

A. No, that would be his original receipt, usually No. 1 copy.

Q. Beneath all these documents is the last document which I will mark as 112-E, entitled "Surplus Shipment."

What is that document?

A. That looks like a document used by Port Hueneme entitled "Surplus Shipment" and is the form of a shipping ticket but can be used also to satisfy custodian to evidence that delivery was made or to indicate shipment of property.

Q. All right. Mr. Koenig, were you familiar with the marketing conditions in California during the

(Testimony of Karl F. Koenig.)

years 1946 and '47, in relation to the type of vehicles used by the government of the United States and disposed of by the government as being surplus to its needs?

Mr. Conron: To which I object as incompetent, irrelevant and immaterial. It is entirely too broad and too general, not confined to area, time and place or commodity.

The Court: Well, I think first this is simply a question as to whether the witness is familiar with it, so I am going to overrule the objection to that question.

Would you read back the question, Miss Schulke?

(Question read.)

The Court: I don't quite understand the question myself. [118] Is the question directed to whether he was familiar with property belonging to the government in California during those years that was surplus to the needs of the government? Is that the question?

Mr. Lavine: Let me withdraw the question.

The Court: It may be a perfectly plain question, but I just don't quite understand it.

Q. (By Mr. Lavine): Are you familiar, Mr. Koenig, with the supply and demand conditions relative to disposal of surplus government vehicles in California during the years 1946 and 1947?

A. Possibly my memory can go back to that time, to answer your question, which I—

(Testimony of Karl F. Koenig.)

Mr. Conron: Pardon me, Mr. Koenig, the question calls for a yes or no answer, the state of your familiarity.

A. I think so.

Q. (By Mr. Lavine): Very well. What was the relation of supply and demand? What was the market condition for the disposal of surplus government vehicles in California during the year 1946?

Mr. Conron: Now, your Honor, I renew my objection, upon the ground the question is incompetent, irrelevant and immaterial, ambiguous and unintelligible, being so general that it fails to specify types of commodities, areas, time or [119] place.

The Court: Well, I think that we ought to at least, Mr. Lavine, relate this to the type of merchandise that may be involved in this case, and I think you also ought to confine it to general area in which these sales occurred or in which the defendants operated.

Mr. Lavine: Very well. I will withdraw the question, with your Honor's permission.

Q. What was the relation of supply and demand to surplus government vehicles of the following types: Trucks, and by trucks I will include ten-ton trucks, 6-ton trucks, five-, four-, two and a half-, three-quarters and one-half-ton trucks; jeeps; truck trailers, to be added to the types of vehicles I have just described, in the area of California, encompassing San Francisco, Port Hueneme, Los Angeles and Bakersfield; in relation to these items in these

(Testimony of Karl F. Koenig.)

areas what was the relation between supply and demand during the year 1946?

Mr. Conron: Now, your Honor, I have a further objection to the form of that question; it is compound.

The Court: Well, I think probably it is a compound question. You might break it down, Mr. Lavine.

Mr. Lavine: Very well. I restrict my question to trucks, government surplus trucks of all tonnages, from ten ton down to one-half ton trucks. What was the relation [120] between supply and demand in this area?

A. There was a shortage of supply, and great demand.

Q. Was this true through the period here?

A. To my knowledge it was.

Q. Was there any difference to your knowledge between Northern California and Southern California?

A. No; the situation was the same.

Q. Was there any difference between California and the rest of the continental United States, if you know?

The Court: That is a pretty broad question.

Mr. Lavine: I will withdraw the question, your Honor.

Q. Passing now to jeeps—

The Court: I represented a lot of farmers during that period, using vehicles of all types in this area. All right. I think the question about the com-

(Testimony of Karl F. Koenig.)

parison between the Valley and California and the rest of the continental United States probably wouldn't be very helpful.

Mr. Lavine: Very well, your Honor, I will withdraw the question.

Q. Would your answer be the same if the same question were put to you in relation to what are popularly called jeeps? A. Yes, sir.

Q. Would your answer be the same if I put the same question to you as to trailers designed to be attached to [121] trucks of the tonnages I have previously mentioned? A. Yes.

Q. What do you mean when you say there was a shortage of supply in relation to demand, Mr. Koenig?

A. During the war years all production of automotive vehicles went mainly for the military, and the civilian market was not able to purchase trucks, and therefore when they became available as surplus in the market there were more buyers than there were trucks.

Q. Did the government agency which you represented have any difficulty in disposing of its surplus government trucks? By that, I mean after the various sales that you conducted, did you have any new or used vehicles left over?

Mr. Conron: I think, your Honor, that calls for an opinion of the witness in a field in which he has not qualified.

The Court: Well, do you know, Mr. Koenig?

(Testimony of Karl F. Koenig.)

issued to veterans who certified that they purchased property for personal use only?

A. I am not sure, sir.

Q. And that the pink certificates were issued to veterans who indicated in their application that they intended to use the property for their business or for resale?

A. I am not sure.

Mr. Conron: Mr. Clerk, may I have Exhibit 6?

Q. Mr. Koenig, I believe you told us that Plaintiff's [131] Exhibit 6 was a brochure mailed to veterans only?

A. I believe so, yes.

Q. Now, that was mailed to a list that had been compiled in what manner? Of course, that is just a sample, but the list that would be mailed to, how would that list be compiled?

A. I believe that would be compiled on the basis of a veteran having previously come in and signed an application.

Q. Application for preference?

A. Yes.

Q. Now, would that list be mailed to any persons other than veterans who had come in and signed an application for priority, if you know?

A. I don't believe so.

Q. You don't believe so. Are you positive?

A. I can say I am positive.

Q. Now, let's just take at random one of these articles that are listed here, item 291, on 11.

The Court: Article what?

Mr. Conron: I am taking the top item on the right-hand side; this is 11, I believe the eleventh vehicle on the list offered, is that right?

(Testimony of Karl F. Koenig.)

A. That is correct.

Q. Now, it is a 1943 Willys jeep, is that right?

A. Correct.

Q. And four by four? A. Right. [132]

Q. And this figure is the offered price, \$395?

A. Fixed price; it would be the offered price.

Q. Fixed price. Now, what would happen to that jeep after this offering had been made to veterans and the time for the sale had expired? Would it show up later on another list?

A. If it had not been sold?

Q. Yes.

A. It would show up on a later list.

Q. Or would you merely mail this list to other people?

A. No; it would have to be embodied in a new offer.

Q. You would recompile a new list and submit it to other veterans?

A. To other vehicles that had been developed.

Q. And that practically would apply to all the articles appearing here?

A. That is correct.

Q. What type of sale did you advertise, Mr. Koenig? A. I believe for veterans only.

Q. I mean, was it a mail sale?

A. I can't tell.

Q. You held mail order sales? A. Yes.

Q. Now, a mail order sale, you would announce all this property for sale on and after a certain date? [133]

(Testimony of Karl F. Koenig.)

A. I believe we had to receive the mail order by a certain date, yes.

Q. I notice down here you have awards will be made September 30th.

A. There must be something stated, not later than 5:00 p.m., September 7th.

Q. I see, and awards will be made September 30th, that is when you parcel them out?

A. That is correct.

Q. Now, on these mail order sales, how long would the vehicles be held available for veterans?

A. They were supposed to take them as soon as possible, but I believe delivery was to have taken place within ten days, unless otherwise specified, and I don't know if it specifies here, but I believe the general terms and sales conditions would indicate ten days.

Mr. Conron: Mr. Clerk, may I have Exhibits 3 and 4?

Q. Mr. Koenig, I show you Plaintiff's Exhibit 4, which you have discussed in your direct examination. I believe you told us that was a sale to dealers? A. That is correct.

Q. Had the property listed there been previously awarded or offered to veterans?

A. That I cannot say.

Q. And I show you Plaintiff's Exhibit No. 3, \$14,000,000 sale to veterans only. Do you know whether or not that [134] brochure was made available to the general public?

A. This particular sale?

(Testimony of Karl F. Koenig.)

Q. That brochure?

A. I would say it was sent to the mailing list of World War II veterans.

Q. To the best of your knowledge?

A. Yes.

Q. Do you have any possible knowledge of whether or not that brochure was not also made available to the public generally?

The Court: You mean made available by the government?

Mr. Conron: Yes. I don't mean just a veteran handing it out.

A. It is possible that a man who was not a veteran could have come into the office and gotten one of these brochures.

Q. Now, with reference to surplus sales at Port Hueneme, Mr. Koenig, do you know whether or not sales were conducted at Hueneme to the public generally? A. At this particular time?

Q. During 1946.

A. Automotive vehicles, or general sales?

Q. Automotive, trucks, trailers, this type of merchandise.

A. I would say on vehicles which had previously been offered to priority claimants and were not sold for one reason [135] or other, condition, specially made, something like that, they were then offered to the general public at Hueneme.

Q. What was the preference date set forth in that brochure with reference to preference to veterans only?

(Testimony of Karl F. Koenig.)

The Court: We are talking about Exhibit 3, are we?

Mr. Conron: Yes.

A. This sale was indicated for veterans only, and they were supposed to have—the sale—this was a site sale starting at 8:00 o'clock on March 20th; the veteran was supposed to be at the site to participate.

Q. Be there on the ground on May 20th, and for what period of time did the brochure indicate the property would be available to veterans only? Was the date undetermined, or was it limited?

A. I am not quite sure I understand your question.

Q. According to the brochure, how long a time after May 20th, 1946, did the veterans have to purchase under the prior rights afforded by that brochure?

A. The terms of the sale indicate that it is a continuing sale, starting on a particular time and hour, and that only a certified veteran may exercise his priority. He cannot delegate his right of purchase to any other person. How long the sale lasted, I do not know. There were about 5,500 vehicles, and it may have lasted several days.

Q. I see. But from that brochure, at least as far as [136] your examination of it informs you, you don't find a termination date?

A. No, sir.

Q. But that would not necessarily indicate to you that there was not a termination date, is that not correct?

(Testimony of Karl F. Koenig.)

A. No, sir. It was not advertised in this brochure.

Mr. Conron: Yes. Thank you, Mr. Koenig.

**Redirect Examination**

By Mr. Lavine:

Q. Mr. Koenig, you were asked a number of questions as to the various successor agencies that handled the disposition of government surplus property in the year '43 and thereafter. Do you know of your own knowledge whether after 1944, whether all agencies, government agencies disposed of property under the Surplus Property Act of 1944, or on some other basis?

A. The War Assets Administration was designated disposal agency for all government surplus at that time.

Q. And do you know of your own knowledge as to what statute the War Assets Administration operated under?

A. I don't know whether it was a public law or whether it was an executive order, but I believe it was an executive order, and I don't recall the number of it.

Q. There were various legal entities set forth by executive order of some sort or other? [137]

A. That is right.

Mr. Lavine: I have no further questions.

The Court: Mr. Koenig, apparently that is all.

Mr. Lavine: May Mr. Koenig be excused from further attendance on the court?

(Testimony of Karl F. Koenig.)

The Witness: I believe I can answer the question.

The Court: I will overrule the objection.

A. To my knowledge, there was such a continuing demand we had no difficulty in disposing of automotive equipment.

Q. (By Mr. Lavine): Do you have any knowledge as to whether in this area for the types of vehicles heretofore described, was there more or was there less or an equal amount of demand by potential customers for the vehicles you had to [122] offer?

A. There was more of a demand than a supply.

Q. Do I understand there was more than a crying need for these vehicles than you had vehicles to dispose of?

A. Yes, sir.

Mr. Lavine: No further questions.

The Court: I think before you start your cross-examination we will have our morning recess.

(A short recess.)

The Court: All right, Mr. Conron.

#### Cross-Examination

By Mr. Conron:

Q. Mr. Koenig, while we are on this shortage business, let's go into that a bit. It is true, is it not, that many of the army vehicles were so designed for military and not civilian purposes?

A. Yes, sir.

Q. Now, take, for instance, command cars, they

(Testimony of Karl F. Koenig.)

were designed specifically for military as distinguished from civilian purpose, were they not?

A. Yes.

Q. What was the condition of supply and demand in respect to command cars?

A. Well, it had wheels and they possibly figured there was an interest from a civilian standpoint in providing transportation, even though it wasn't the most comfortable type. [123]

Q. Isn't it true that there was no demand for command cars until they had been remodeled, particularly in the year '46?

A. Well, let's say they were an exceptional type of vehicle.

Q. Did it come to your attention that over 300 command cars were going begging for a market in 1946?

A. I can't recall.

Q. How about weapon carriers? Did they have a civilian as distinguished from a military use?

A. No.

Q. And it was necessary, was it not, to remodel weapon carriers in order to create a civilian demand?

A. Usually, yes, sir.

Q. And how about nine-foot width trailers? Did they have a civilian as distinguished from a military use?

A. Not ordinarily; they were designed for military use.

Q. They had no civilian use of any consequence in the State of California by reason of the eight-foot width limit for use on highways; is that not

(Testimony of Karl F. Koenig.)

right? A. Yes, sir.

Q. And that is specifically true of Fruehauf trailers that the Army had? A. I believe so.

Q. How about bomb dollies? [124]

A. Specifically military.

Q. And there was no comparable civilian use, and hence no civilian demand for implements or vehicles of that type, isn't that right?

A. Without some conversion.

Q. Without a conversion process. How about half-ton four by four trucks?

A. They were in demand.

Q. Isn't it true that it was necessary to remodel the frame of those trucks in order to make them economically usable commercially?

A. Well, I am not particularly familiar with the half-ton four by four. They were probably slower than the passenger-type vehicles, and possibly could satisfy a particular use on the farm, cross country travel, or something like that; but I wouldn't know about demand for that particular vehicle.

Q. Isn't the condition the same in respect to the one and a half ton four by four trucks?

A. Commonly known as the jeep?

Q. I believe the jeep is half, quarter ton.

A. I know they call them trucks four by four; I am not sure of the weight.

Q. Now, how about the two and a half ton?

The Court: I don't think the witness had finished his answer. [125]

Mr. Conron: Pardon me.

(Testimony of Karl F. Koenig.)

The Court: Had you finished?

The Witness: Let me say, in all of the categories you mentioned, they were strictly designed for military purposes.

Q. (By Mr. Conron): And two and a half ton four by six trucks, the same?

A. Yes; rather adverse.

Q. Now, isn't it true, Mr. Koenig, that the civilian market for these articles that I have specifically mentioned was limited to buyers capable to reconverting the articles to a specified civilian use?

A. I would say that is a fair question.

Q. Would you say that the demand was greater than the supply in respect to these articles, bearing in mind that the civilian market was limited to people who could reconvert?

A. I would say that substituted use or conversion use was necessary, because there were no other vehicles available.

Q. And necessarily, therefore, the market was limited to those who could make that substitution, isn't that right?

A. I would say that people engaged in purchasing those vehicles then faced the possibility of spending money for conversion because there was no other alternative.

Q. Now, from your observation in the year 1946, how many veterans who had served in World War II do you personally know of that had the equipment and machinery capable of [126] reconverting this merchandise?

A. Very few.

(Testimony of Karl F. Koenig.)

Q. I believe you told us that in March 26th of 1946 the War Assets Administration took over?

A. I believe that is the date, yes.

Q. In the disposition of surplus property for the government. Prior to that time, just in the year 1946, that is all we are concerned with here today, what department had control of the disposition of war surplus?

A. Just prior to March 26th, for only two months, I believe, it was a subsidiary of the Reconstruction Finance Corporation, known as the War Assets Corporation.

Q. Was that under the Treasury Department?

A. No, sir.

Q. Didn't the Treasury Department at one time have control of the disposition?

A. Yes, sir; in 1943 and 1944 under the Federal Property Utilization Branch of the United States Treasury, Procurement Division.

Q. And from 1944 to 1946, was it under that department?

A. One more; the Department of Commerce.

Q. So actually during the war surplus era there were four or five different departments having control?

A. Yes.

Q. They each had their separate regulations, which were [127] not necessarily identical, I would assume that to be true?

A. I believe most of them were based on the Surplus Property Act, Regulation 7, but they did have their own implementation thereof.

(Testimony of Karl F. Koenig.)

Q. And the War Surplus Act was enacted by Congress in 1944? A. Correct.

Q. Previous to that there was not a specific Act on the statutes of the United States?

A. I believe so, yes.

Q. You spoke of being stationed or located in San Francisco? A. Yes.

Q. And your San Francisco area serviced what territory?

A. Well, under the various regimes it served several geographical areas, but the terms of the War Assets Administration in 1946 they had at that time extended the Los Angeles regional office so we were for Northern California, the dividing line being San Luis Obispo, the State of Nevada and the Territory of Hawaii.

Q. You mention San Luis Obispo; how about Kern County?

A. Is that south of San Luis Obispo?

Q. It is east.

The Court: It is in the Valley; San Luis Obispo is on the Coast. [128]

The Witness: The name San Luis Obispo sticks in my mind, but I would not know about Kern County, but I might judge that would fall under the jurisdiction of the Los Angeles regional office.

Q. (By Mr. Conron): That is mere surmise?

A. That is right.

Q. It is true, or do you know whether it is true that your San Francisco office serviced veterans residing in Kern County?

(Testimony of Karl F. Koenig.)

A. They did, but I don't believe they did in the period of which we are speaking.

Q. That would be after March 26th of 1946?

A. The Los Angeles regional office was established, I believe, a year and a half, and then it was transferred back to San Francisco, and we took over the entire State of California in late 1947 or early 1948.

Q. Well, do you know whether or not there was a hard cut and fast dividing line between your San Francisco and your Los Angeles offices, insofar as Kern County is concerned?

A. I won't be able to say whether there was a hard and fast dividing line, but I will be able to say that the military installations in the lower part of California were handled by Los Angeles, and those in Northern California were handled by San Francisco.

The Court: Well, ordinarily we think of the dividing [129] line between Southern California and Northern California as being the Tehachapis, which throws the San Joaquin Valley into Northern California.

The Witness: Then San Luis Obispo is north of the Tehachapis?

The Court: Yes, but it is way over on the coast.

Q. (By Mr. Conron): Mr. Koenig, I am showing you Plaintiff's Exhibit No. 5, which is a veteran's preference certificate. A. Yes.

Q. It has the name Owen N. Dailey, 2328 Chester Avenue, Bakersfield, as the name and mailing ad-

(Testimony of Karl F. Koenig.)

dress of the veteran. If I told you that priority certificate was secured from San Francisco, would that assist you in determining whether or not your territory encompassed Kern County?

A. May I look at this?

Q. Yes.

A. This, I believe, was issued in San Francisco because it has a case number V-10, and San Francisco was the tenth region and I believe that is the code designation.

Q. Would that assist you in recollecting now whether or not Kern County was within the San Francisco area?

A. No, sir, but that does not mean that any veteran could not come to San Francisco, wherever he resided, and get a veteran's preference [130] certificate.

Q. It would make no difference to your office?

A. No.

Q. You made no territorial distinction in that regard? A. No.

Q. By the way, does the color of this certificate have any significance? A. Yes; it does.

Q. What is that significance? A. Priority.

Q. Of what particular degree?

A. Well, they chose pink because it stood out, I presume, because it was easily recognizable.

Q. No, no. I will go back and try again. You had some green certificates, too, didn't you?

A. Not that I recall.

Q. Isn't it true that the green certificates were

items listed below in order of my preference, and offered in sale No. 45378, whose sale date is June 25-26th, 1946."

In addition there is the conventional stamp type of certificate signed by Harlan L. McFarland.

The Court: That would be 147, and that refers to item 9?

Mr. Lavine: That is right, your Honor.

The Court: Very well.

(The document referred to was marked as Plaintiff's Exhibit 147, and was received in evidence.)

Mr. Lavine: As Exhibit 148, I offer this for transaction No. 10; the sale is 45378, tag 967.

Mr. Conron: Is that 10-A and -B, or just 10-A?

Mr. Lavine: Just a minute, Mr. Conron. Will the Court excuse me a moment, there may be a mistake?

The Court: 10 has A and B.

Mr. Lavine: Yes; 10 has A and B, your Honor. The documents therein, your Honor, are mixed in nature, are stapled in there, I notice from an examination of the file that there are sales documents herein respectively referring to separate motor numbers and to separate tag numbers. The tag number for the item set forth as 10-B is tag 967.

The Court: No; that is the one you gave us for A, at least my notes show tag 967, sale 45378.

Mr. Lavine: The information I gave the Court in that [146] respect, your Honor, is incorrect. 10-A, the tag number for 10-A should be tag 75.

The Court: The sale number is the same?

Mr. Lavine: The sale number is the same. The tag number for 10-B should be in that case 967.

The Court: Well, then, both of those transactions will be received under the number, Exhibit 148; that is, that will include 10-A and 10-B.

Mr. Lavine: That is correct. Incidentally, contained in this file are copies both of tags 75 and 967, respectively, and each contains a conventional stamped form of certificate by Mr. McFarland.

(The documents referred to were marked as Plaintiff's Exhibit 148, and were received in evidence.)

Mr. Lavine: May I say again, your Honor, that for sale 45783, we do not have a catalog available. I believe I mentioned that previously.

The Court: 45378? You said 45783.

Mr. Conron: 45378.

Mr. Lavine: Yes. Did I?

The next item is Exhibit 149, transaction No. 11. The sale number is 45783. Your Honor, to clear up the confusion, there are two catalogs, almost the same numbers. We have catalog 45378, it is in evidence. We do not have a catalog for 45783. This transaction bears tag 202. [149]

The Court: It will be received as Exhibit 149.

(The document referred to was marked as Plaintiff's Exhibit 149, and was received in evidence.)

Mr. Lavine: There are two forms of certificate

Mr. Conron: As far as I am concerned.

The Court: You may be excused, Mr. Koenig, as far as the Court is concerned.

(Witness excused.)

Mr. Lavine: Your Honor, getting back now to the introduction of the documents, I believe the last exhibit offered was 112, if I am not mistaken.

The Clerk: That is right.

Mr. Lavine: I now would like to offer a series of exhibits from transaction No. 2-A, to and including 2-F, all in the third cause of action. The first is No. 2-A, tag No. 1646.

Mr. Conron: Exhibit 113?

Mr. Lavine: Yes; Exhibit 113.

The Court: Yes; just let me get that now, Mr. Lavine. I have it now.

Mr. Lavine: The sales number and catalog number is sale 45324, tag number 1646. All of the "2" series will bear the same sales number, 45324, and all that I will later introduce in the "2" series will contain a certificate therein, [138] which in each case will be the form of veteran's preference certificate, that is the stamped form on the back of one of the sales documents signed by Harlan McFarland.

I offer 113, your Honor.

The Court: It will be received and so marked.

(The document referred to was marked as Plaintiff's Exhibit No. 113, and was received in evidence.)

Mr. Lavine: I offer as 114, tag 1645; that is transaction 2-B, your Honor.

The Court: Yes.

(The document referred to was marked as Plaintiff's Exhibit No. 114, and was received in evidence.)

Mr. Lavine: As 115, Exhibit 115 for transaction 2-C, tag No. 1647.

The Court: It will be received and so marked.

(The document referred to was marked as Plaintiff's Exhibit No. 115, and was received in evidence.)

Mr. Lavine: For transaction 2-D, I offer Exhibit 116, tag 1655.

The Court: So marked and received.

(The document referred to was marked as Plaintiff's Exhibit No. 116, and was received in evidence.)

Mr. Lavine: I offer Exhibit 117, transaction 2-E, tag No. 1654.

The Court: It will be received and so [139] marked.

(The document referred to was marked Plaintiff's Exhibit 117, and was received in evidence.)

Mr. Lavine: I offer as Exhibit 118, for transaction 2-F, tag 1656.

The Court: It will be received and so marked.

(The document referred to was marked Plaintiff's Exhibit 118, and was received in evidence.)

Mr. Lavine: For transactions 3-A, -B and -C, which I am now about to offer, your Honor, the sales number in each case will be the same, sale 45324, and it will be the same type of certificate of Mr. McFarland, contained on the back of one of the sales documents. The first is Exhibit 119, transaction 3-A, tag 2356.

The Court: It will be received and so marked.

(The document referred to was marked Plaintiff's Exhibit 118, and was received in evidence.)

Mr. Lavine: For 3-B, I offer Exhibit 120, tag 2357.

The Court: So marked and received.

(The document referred to was marked Plaintiff's Exhibit 119, and was received in evidence.)

Mr. Lavine: For Exhibit 121, this pertains to transaction 3-C, tag 2358.

The Court: So marked.

(The document referred to was marked Plaintiff's Exhibit 120, and was received in evidence.) [140]

Mr. Lavine: Next are two folders on transactions numbers 4-A and 4-B, respectively. In each case the sales number will be 45324, the same as before,

and the certificate within will be the same. For No. 4-A, I offer Exhibit 122, tag 1620.

The Court: It will be received and so marked.

(The document referred to was marked as Plaintiff's Exhibit 122, and was received in evidence.)

Mr. Lavine: For 4-B, I offer Exhibit 123, tag 1621.

The Court: It will be received and so marked.

(The document referred to was marked as Plaintiff's Exhibit 123, and was received in evidence.)

Mr. Lavine: The next exhibit in order is 124, for transaction No. 5, sales is the same 45324, tag 3983.

The Court: That will be?

Mr. Lavine: 124.

The Court: 124, it will be received.

(The document referred to was marked as Plaintiff's Exhibit 124, and was received in evidence.)

Mr. Lavine: The next exhibit that I have marked 125, is for transaction No. 6, both 6-A and 6-B. The certificates for each, respectively, are contained within such folder, and I have placed a paper clip, respectively, around the documents pertaining to 6-A and also those pertaining to 6-B. There is the same type of certificate for both A and B. The sale

number is 45262. The tag number for 6-A is 810, and for 6-B is 811. [141]

The Court: A would be 125.

Mr. Lavine: 125.

The Court: And B would be 126. Received.

(The documents referred to were marked as Plaintiff's Exhibit 125, and were received in evidence.)

Mr. Lavine: I next have a series of documents all pertaining to transaction No. 7, from 7-A to 7-T, respectively, and for convenience in offering them into evidence I have designated each with a separate exhibit number. In each case the sales number is the same, 45283. The first is 7-A, Exhibit 126, tag 1235, which contains the same type of certificate, and all the others will contain the same type of certificate signed by Mr. McFarland, unless I indicate to the contrary.

The Court: Let's see, would that be—

Mr. Lavine: 126, your Honor.

The Court: 127, according to my record.

The Clerk: I don't have any 126.

Mr. Conron: Transaction 6-B.

The Clerk: Was that 125 and 126?

Mr. Lavine: No, your Honor. I marked 125 for both transactions A and B. I did not designate a separate number, because of the physical way the documents were in the file, so with the Court's permission I will start with 126.

The Court: Very well. [142]

Mr. Lavine: 7-A, tag 1235.

(The document referred to was marked as Plaintiff's Exhibit 126, and was received in evidence.)

Mr. Lavine: Exhibit 127 is transaction 7-B, tag 1175.

The Court: It will be received.

(The document referred to was marked as Plaintiff's Exhibit 127, and was received in evidence.)

Mr. Lavine: 7-C is 128, tag 1177.

The Court: It will be received.

Mr. Lavine: 129 is 7-D, tag 1181.

The Court: 1181.

Mr. Lavine: Yes, your Honor.

The Court: That is 129.

Mr. Lavine: Yes, your Honor. 7-E is Exhibit 130, tag 1182.

The Court: It will be received and so marked.

Mr. Lavine: Exhibit 131 is 7-F, tag 1183.

The Court: It will be received.

Mr. Lavine: Exhibit 132 is 7-G, tag 1186.

The Court: It will be received.

Mr. Lavine: Exhibit 133, is sale 7-H, tag 1187.

The Court: It will be received.

(The documents referred to were marked as Plaintiff's Exhibits 128, 129, 130, 131, 132 and 133, respectively, and were received in [143] evidence.)

Mr. Lavine: Exhibit 134 will be 7-I, tag 1188.

The Court: It will be received.

Mr. Lavine: Exhibit 135 is 7-J, tag 1190.

The Court: It will be received.

Mr. Lavine: 136 is 7-K, tag 1192.

The Court: It will be received and so marked.

Mr. Lavine: Exhibit 137 is 7-L, tag 1193.

The Court: It will be received.

Mr. Lavine: Exhibit 138, is 7-M, tag 1194.

The Court: It will be received.

Mr. Lavine: Exhibit 139 is transaction 7-N, tag 1198.

The Court: It will be received.

Mr. Lavine: Exhibit 140 is 7-O, tag 1202.

The Court: It will be received.

Mr. Lavine: Exhibit 141 is 7-P, tag 1203.

The Court: It will be received.

Mr. Lavine: Exhibit 142 is transaction 7-Q, tag 1204.

The Court: It will be received.

Mr. Lavine: Exhibit 143 is transaction 7-R, tag 1206.

The Court: It will be received.

Mr. Lavine: Transaction 7-S is Exhibit 144, tag 58.

The Court: It will be received.

(The documents referred to were marked as Plaintiff's Exhibits 134, 135, 136, 137, 138, 139, 140, 141, 142, 143 and 144, respectively, and were received in evidence.) [144]

Mr. Lavine: Exhibit 145 is transaction 7-T, tag 57.

The Court: It will be received.

(The document referred to was marked as Plaintiff's Exhibit 145, and was received in evidence.)

Mr. Lavine: I am handing the Clerk, your Honor, all of the "7" series in one folder.

The next transaction, No. 8, is Exhibit 146, sale 45350, tag 455. There are two types of certificates within. First of all, is a letter to the War Assets Corporation from Harlan L. McFarland, apparently undated, which refers to and there is attached thereto a pink veteran's preference certificate, similar in type to those previously introduced and discussed in evidence. Also there is a form, which is WAA SF-29, called Mail Order Request for Surplus Property, and in the middle of the page is the following, signed by Harlan L. McFarland; "Attached is my original Veteran's Preference Certificate 10-A-24063 for items desired," and some further writing.

I offer that as Exhibit 146, your Honor.

The Court: It will be received and so marked.

(The document referred to was marked as Plaintiff's Exhibit 146, and was received in evidence.)

Mr. Lavine: For transaction No. 9, I offer Exhibit 147, tag 1497. The sales catalog number is 45378. And within there is a letter from—unsigned letter bearing the letterhead of McFarland Motors, undated, in which the following [145] language appears: "If available I desire to purchase 10 of the

contained within, the stamped form of certificate signed by Mr. McFarland, and in addition there is a form WAA SF-29, Mail Order for Surplus Property, containing the certificate by Harlan McFarland, which reads in part as follows: "Attached is my original Veteran's Preference Certificate 10-A-24063, for items desired." That is Exhibit 149, your Honor.

The Court: Yes.

Mr. Lavine: Exhibit 150, is for transaction No. 12, that is for sale 45783, again as I say no sales catalog available for such sale; tag 1994.

There are two certificates within. The first is a stamped certificate signed by Mr. McFarland, and the second is the form WAA SF-29, Mail Order Request for Surplus Property, signed by Mr. McFarland, similar to the one previously described.

The Court: It will be received and marked Plaintiff's Exhibit 150.

Mr. Lavine: That is my last exhibit, your Honor, and in case I have failed to offer all prior exhibits in evidence, I renew my request at this time.

Mr. Conron: I believe you have offered them all. [150]

The Court: They are all in evidence, aren't they, Mr. Eiland?

The Clerk: Yes. These catalogs introduced this morning covered all of them.

Mr. Conron: Just in case there might be a catalog he hasn't offered, I will object to any exhibit of a catalog.

The Court: Well, during the noon recess suppose

you check with the Clerk and see. It makes a little better record.

We will take our noon recess and we will reconvene at 2:00 o'clock.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [151]

Afternoon Session—2:00 P.M.

The Court: Are you ready, Mr. Lavine?

Mr. Lavine: Ready, your Honor. Will the Clerk call the defendant Schwartz to the witness stand?

**WILLIAM ERDWIN SCHWARTZ**

one of the defendants, called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name.

The Witness: William Erdwin Schwartz.

The Clerk: Have that seat.

Direct Examination

By Mr. Lavine:

Q. Mr. Schwartz, you are one of the defendants in this action? A. Yes.

Q. The defendant, Mr. E. B. Hougham, is your stepfather, is he not? A. That is correct.

Q. Before World War II did you work for Mr. Hougham, or for Baker's Motor Market?

A. Yes.

(Testimony of William Erdwin Schwartz.)

Q. For how long a time did you so work?

A. I don't recall right now. I think it was after school and on week ends. [152]

Q. What type of work did you do there at that time? A. A little bit of everything.

Q. About what date did you enter the military service during World War II?

A. In 1942, I believe it was in September.

Q. And approximately when were you discharged or separated from active service?

A. October, 1945.

Q. Now, at or about that time did you return to the Baker's Motor Market to become employed?

A. I recall my stepfather picked me up in Arizona.

Q. And what was your occupation after you returned from Arizona to Bakersfield in 1945?

A. I bought and sold and serviced the trucks and got them in shape.

Q. Where was this that you performed those services? A. At Bakers' Motor Market.

Q. Were you employed by Mr. Hougham?

A. I never was actually employed, sir. I was on an open drawing account.

Q. Were you a part owner of the business?

A. Well, it was a family deal with me. I took an interest in the business and whatever I bought was for my own interest, more or less.

Q. What were your duties or what did you do for Baker's [153] Motor Market?

(Testimony of William Erdwin Schwartz.)

A. I bought and sold and picked up the trucks in the various places, or whatever.

Q. I believe you stated you had an open drawing account with Mr. Hougham. Would you describe that a little further?

A. Well, I drew whatever I needed or wanted in the way of money, and charged whatever I wanted to, him or his business.

Q. Did you engage in some purchase of vehicles at surplus property sales during this period of time, '45, '46 and '47?

A. Yes.

Q. Did you obtain a veteran's certificate to give you a veteran's priority at about this time?

A. I don't recall, sir. It seems to me like an application, but I am not too sure.

Q. I show you Plaintiff's Exhibit 76, and ask you to read that application. I am going to draw your attention to certain items on Exhibit 76. First of all, I direct your attention to item 2, where it says "mailing address" and there appears the address, 525 Jones Street. Did you ever have a residence address at 525 Jones Street, in San Francisco, California?

A. No.

Q. Did you ever have a business address at 525 Jones Street, San Francisco?

A. No; I never did at that time, no. [154]

Q. Item 4 states that Schwartz Truck Rentals is the trade name of the enterprise. To your knowledge, was there a Schwartz Truck Rental at 525 Jones Street in San Francisco, California?

(Testimony of William Erdwin Schwartz.)

A. Well, I intended to go into the truck rental business. That is how that happens to be there.

Q. Making the question a bit more specific; do you know if there was any Schwartz Truck Rental at 525 Jones Street, on or about March 20, 1947, which is the date of this application? A. No.

Q. Schwartz Truck Rental, is that the name you picked out for the enterprise you were about to embark upon? A. Yes.

Q. Also item 5 gives the address 525 Jones Street, San Francisco, as being the address for Schwartz Truck Rental. Do you know of your own knowledge as to whence came this address, 525 Jones Street?

A. Well, as I recall, I got that from my step-father.

Q. What do you mean, got it from him?

A. Well, that is all I can remember about it at this time, it seems I received it from him.

Q. Now, item 6-C, it states, "Description of enterprise Truck Rental." Would you elaborate and describe what you mean when you place the words "truck rental" on this application?

A. Well, at that time there were a lot of dealers and [155] individuals, veterans, buying surplus, and we thought it might be a good idea if I got into something where I could do some hauling for these individuals or dealers, or rent them the equipment.

Q. Now, referring down to item 10, where are listed a certain number of trucks, five truck weapons

(Testimony of William Erdwin Schwartz.)

carriers, do I read, that one-half ton or one and a half ton, first item on paragraph 10?

A. I can't figure that out either.

Q. It looks more like one-half than one and a half to me. Were those trucks intended by you to be used on a rental basis?

A. The only trucks that I can remember are five Diamond T trucks and trailers.

Q. The next item there is nine 4-ton heavy duty Diamond T trucks. Were those the trucks?

A. Yes.

Q. What about the third item, "15 low bed Freuhauf 22 tons" trucks. Were those intended by you to be—

Mr. Conron: You mean trailers?

Mr. Lavine: I beg your pardon, I mean trucks, low bed Freuhauf trucks, 22 tons.

A. I don't know anything about low bed trucks.

The Court: Just a minute, it says "low bed Freuhauf," I guess. Now, does more appear? [156]

Mr. Lavine: No; the same appears here, your Honor.

The Court: Then 22 tons, as I understand it.

Mr. Lavine: I was doing a little interpolation in there, your Honor, 22 tons, must mean a Freuhauf truck and not a Freuhauf trailer.

The Court: Oh.

Mr. Lavine: I will ask the witness.

The Court: Yes.

Q. (By Mr. Lavine): Do you have any knowl-

(Testimony of William Erdwin Schwartz.)

edge whether you mean low bed Freuhauf trucks or low bed Freuhauf trailers in this third item?

A. They would be low bed Freuhauf trailers.

Q. Trailers? A. Yes.

Mr. Lavine: I guess I stand corrected on my observation, your Honor.

The Court: Now, as I understand the application, under 10, those are the items of merchandise, the types that the witness wanted for his business, is that your understanding?

Mr. Lavine: That is correct. That is what he wants; he may or may not get that.

The Court: No. All right.

Q. (By Mr. Lavine): Referring now to the opposite side of Exhibit 76, particularly to item 18, I am starting in the middle of [157] item 18, you state therein "that I am, or will be, directly or indirectly, the sole proprietor of the enterprise described herein." Now, were you directly or indirectly the sole proprietor of the enterprise described on the other side of this application?

A. Well, I intended to be, yes.

Q. Were you indirectly the proprietor of the enterprise described on the other side?

A. Well, the deal was I was going to borrow money through my stepdad to operate it and I would eventually pay him back.

Q. Would you describe what, if any, financial arrangement you had with Mr. Hougham to finance the purchase of the vehicles which you hoped to get by means of this application?

(Testimony of William Erdwin Schwartz.)

A. Would you repeat that?

The Court: Read the question, Miss Schulke.

(Question read.)

A. Well, he was going to loan me the money, so far as I know, and I would repay him back what he loaned me.

Q. (By Mr. Lavine): Did you have any agreement in writing with Mr. Hougham?

A. No; it was oral.

Q. An oral agreement. Was this agreement made with Mr. Hougham alone, or with any other party in conjunction with Mr. Hougham? [158]

A. I believe it was alone, sir.

Q. Did you have any conversation with any officer or representative of any bank in connection with such proposed financial arrangements?

A. No, sir.

Q. Did Mr. Hougham give you any letter of credit, or any other form of letter to any other bank to arrange for such credit?

A. No, sir.

Q. Did Mr. Hougham make all the financial arrangements with the bank himself?

A. I don't recall, sir, about that. All I know is he would loan me the money.

Q. Going back again to item No. 7, can you figure this out? Was it a "no" crossed out and marked "yes" or is it a "yes" that is marked out and "no."

A. I actually can't tell, it has been so long ago it doesn't come to my mind.

(Testimony of William Erdwin Schwartz.)

Q. Going further down on item 18—

The Court: Just a minute. On item 7, as I read it, it says, "Is the enterprise already established." Now, I don't know, it seems to be, at least there is a "y" apparently, and then it might be an "es" and maybe something written over it. I am not sure. But then it says, "If 'yes' are you now operating it" and the answer is "no." Is that right? [159]

Mr. Lavine: That is the way it appears on the original, your Honor.

The Court: All right.

Q. (By Mr. Lavine): Continuing on—incidentally, still remaining on item 7, at the time of making this application, March 20, 1946, did you have the enterprise already established?

A. I did, yes, to the extent that I intended to go into the business, sir.

Q. Did you have a place of business at the time?

A. The address, like I say, I received from my stepfather, as near as I can remember, and that is as far as I can remember.

Q. Did you have any stock in trade?

A. Well, equipment, that is what I was going into the business for, I intended to have the equipment.

Q. Did you have any bank credit at the time?

A. No.

Q. Had you obtained any license from the State of California at the time?

A. I had a motor vehicle and Board of Equalization license.

(Testimony of William Erdwin Schwartz.)

Q. Do you recall if you had any business stationery made up at the time? A. No.

Q. Had you done any advertising, or put up any signs to [160] announce your going into business at that time? A. No.

Q. Had you received any permit from the City of Bakersfield or the County of Kern to operate a business at that time, under the name of Schwartz Truck Rental, or in your own name?

A. No, sir.

Q. Turning back to item 20 on the form from which I previously read, it states "or, that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested"—let's pause there a moment. Did anyone other than yourself have in excess of 50 per cent of the capital of this enterprise you proposed to go into?

A. No, sir.

The Court: You said referring back to item 20, you meant item 18?

Mr. Lavine: Item 18, your Honor.

The Court: On Plaintiff's Exhibit 76.

Mr. Lavine: That is correct.

The Court: All right.

Q. (By Mr. Lavine): Still reading on, "of either the capital invested in the enterprise or of the gross profits or income thereof." [161] Did anyone other than yourself have more than 50 per cent of

(Testimony of William Erdwin Schwartz.)

the gross income or profits of such proposed enterprise? — A. No, sir.

Q. You further certify that the property is to be used in and as part of the enterprise described in the application, and you state such property was to be used only for such purposes as you have stated? — A. At that time, yes.

Q. Now, were you granted your veteran's priority pursuant to this application, Mr. Schwartz?

A. I don't recall anything other than that due to the length of time there. That is the only thing that comes into my mind, that application.

Q. Do you recall that you did attend some sales conducted for veterans and for the purchase of surplus government vehicles and vehicle accessories?

A. Yes.

Q. Do you recall attending such a sale in Port Hueneme, California?

A. I believe so. I am not too certain on that.

Q. Do you recall making some purchases on veterans' sales in San Francisco? — A. Yes.

Q. Did you intend to remain with the Baker's Motor Market at the same time you were conducting this enterprise [162] you have just spoken about?

A. I don't believe so.

Q. You intended to go elsewhere and establish your business?

A. Yes, if I could get the trucks.

Q. Now, when you went to such veterans' sales, I believe you testified you purchased certain vehicles at such sales, and I am referring now only

(Testimony of William Erdwin Schwartz.)

to sales under veterans' priorities, veterans' sales.

Did you take delivery of such vehicles?

A. I believe I did, sir.

Q. And where did you take those vehicles?

A. They were taken to Bakersfield.

Q. Do you remember where in Bakersfield?

A. Baker's Motor Market.

Q. Were they stored at Baker's Motor Market?

A. Is this referring to my truck rental?

Q. Referring now to any and all of the vehicles purchased at veterans' sales we just spoke about?

A. Yes; taken to Baker's.

Q. They were all stored at Baker's Motor Market?

A. Yes.

Q. And was any work done on the vehicles at Baker's Motor Market?

A. Well, some of them needed work, and some didn't. [163]

Q. And who performed the work on the vehicles that needed work, at Baker's Motor Market?

A. Well, they had men there to do that, and I did some myself.

Q. To your knowledge, were any records kept of the work done at Baker's Motor Market on each vehicle at that particular time?

A. I don't recall any, sir. I wouldn't know.

Q. Did you keep any—

The Court: Just a minute; the witness hadn't finished the answer.

The Witness: I don't recall, sir.

(Testimony of William Erdwin Schwartz.)

Q. (By Mr. Lavine): Did you keep any records of the work done on such vehicles?

A. No, sir.

Q. Do you recall paying for the cost of any such work done on any of these vehicles?

A. No.

Q. During your trips to these veterans' sales, who paid your expenses?

A. My stepfather.

Q. And how did you get to the sales in San Francisco, as you remember?

A. I believe by train. [164]

Q. To the best of your recollection, was the train fare paid for by Mr. Hougham?

A. Well, it came out of the business, I presume.

Q. In other words, you had a drawing account with the business, and if you wanted to buy a train ticket you would draw whatever was necessary to buy a train ticket, is that correct?

A. Yes.

Q. And when you went down to Port Hueneme, how did you get there?

A. I suppose we drove.

Q. Do you recall whose vehicle you drove?

A. No; I don't.

Q. Do you recall now who paid the expenses of such trip?

A. Well, it came out of the business, out of my father's business.

Q. Do you recall one of the trips to Port Hueneme to attend such a sale was made with Mr. McFarland and Mr. Dailey?

(Testimony of William Erdwin Schwartz.)

A. I don't recall any time, sir.

Q. Was any person other than yourself to operate this business in the San Francisco area?

A. No, sir.

Q. Had you ever spoken to anyone located at 525 Jones Street, San Francisco, to your knowledge?

A. No; I hadn't. [165]

Q. Had you ever written any letter to anyone at 525 Jones Street, San Francisco?

A. No.

Q. Had you ever received a communication, oral or written, from anyone at 525 Jones Street, San Francisco?

A. No.

Q. Was it your idea, or that of Mr. Hougham, for you to engage in the rental business, using surplus vehicles?

A. Well, if I remember correctly, it was my idea of going into something and we came to the conclusion that would be a good venture.

Q. Do you recall discussing that with Mr. Hougham?

A. Yes.

Q. To your knowledge, did either of you suggest that you could get a better grade and better priority on vehicles if you were to use your veteran's priority on such sales?

A. No, sir.

Q. You don't recall any conversation along that line?

A. No.

Q. In the course of presentation of exhibits this morning and yesterday, we presented to the Court a number of items allegedly concerning transactions in which you purchased vehicles. I ask you, Mr. Schwartz, if you recall purchasing a truck,

(Testimony of William Erdwin Schwartz.)

Oilfield International two and a half ton, no cab, truck, for the sum of \$3,000? [166]

A. No, sir; I don't recall any individual item.

Q: Do you recall in general that you purchased some kind of vehicle roughly meeting that description?

A. Well, I am not certain. It is possible, but due to the time I can't quite remember.

Q. Would you have any recollection as to what use you might have intended at the time for such vehicle, assuming you purchased same?

A. No, sir.

Q. Also there were listed there, I believe, six bomb carrier trailers, one ton, four wheel, bomb rack and electric brakes. Do you recall making that purchase?

A. I didn't hear that; someone was coughing.

Q. I will repeat it. Do you recall purchasing six—correction, five, bomb carrier trailers, one ton, model 1, 1944, four wheelers, on a veteran's priority basis? A. I don't recall, no, sir.

Q. Do you recall now what purpose you might have had, if any, in purchasing one-ton bomb trailers?

A. Well, they would have been for our business in Bakersfield, is the only reason, I imagine.

Q. You say "our business in Bakersfield." By that, you mean Baker's Motor Market?

A. Yes.

Q. And not for your business in San [167] Francisco? A. No, sir.

(Testimony of William Erdwin Schwartz.)

Q. There are some other items of five 1945 Freuhauf low bed trailers. Do you recall purchasing such Freuhauf low bed trailers? A. Yes.

Q. And what did you intend to use such trailers for?

A. Well, those would have been for my truck rental.

Q. That is the business that was going to be in San Francisco? A. Yes.

Q. Had you previously lived in San Francisco?

A. No, sir.

Q. Did you have any business connections in San Francisco at this time, which is the time I am speaking of, around March 20th of 1946?

A. I don't recall any.

Q. Was anyone other than yourself to aid you in this truck rental business in San Francisco?

A. I don't believe so.

Q. Had you obtained at this time, around March, 20, 1946, any information as to prospective persons who might wish to rent trucks from you in the San Francisco area? A. No, sir.

Q. Reading further on in the allegations of the complaint of the articles you purchased, on which I believe there are [168] exhibits in evidence, there are some five 1942 Diamond T four-ton trucks. Do you remember purchasing such Diamond T trucks?

A. Yes, sir.

Q. And what was the purpose for which you intended to use such trucks?

A. That was for the truck rental service, sir.

(Testimony of William Erdwin Schwartz.)

Q. Also in San Francisco, or in Bakersfield?

A. I imagine San Francisco.

Q. Then there are listed some eight Freuhauf military four-ton trailers. What were the purpose of such trailers?

A. What were the articles again?

Q. There were eight Freuhauf military type four-ton trailers. Do you recall purchasing such trailers?

A. I don't recall; no, sir.

Q. If you had purchased such trailers, what purpose, if any, would you have used these trailers for?

A. They would have gone into our business.

Q. Then an item of a 1941 Dodge one-half ton truck. Do you recall purchasing such truck?

A. I don't recall; no, sir.

Q. What would such a 1941 Dodge truck have been used for?

A. I don't know right at this time, sir.

Q. Next is a 1942 Chevrolet one and a half ton truck. Do you recall purchasing that? [169]

A. No, sir.

Q. Would that have been used for your truck rental business in San Francisco?

A. No.

Q. Would it have been used for Baker's Motor Market in Bakersfield?

A. I presume so, yes.

Q. The next item is a 1940 Dodge one and a half ton truck. Do you recall purchasing that?

A. No, sir.

Q. What would this one and a half ton truck have been used for, if you had purchased the same?

(Testimony of William Erdwin Schwartz.)

A. It would have gone into my father's business. The only thing that I can remember is the five Diamond T and five Freuhauf trailers; that sticks in my mind, but as far as the others individually I couldn't say, you know, one way or the other.

Q. Getting back to these Freuhauf trailers, that is to say the first five trailers I mentioned, I believe these are the five-ton trailers, is that how we described them?

Mr. Conron: Low bed.

Q. (By Mr. Lavine): Low bed trailers. Do you recall that you picked up these trailers at Stockton, Quartermaster Depot at Stockton?

A. I believe at Stockton. [170]

Q. Was any of that equipment brought to Bakersfield? A. Yes.

Q. Did you intend to use these trailers for hauling in your rental business in San Francisco?

A. Yes, sir.

Q. And did you use them in your rental business in San Francisco? A. No.

Q. Did you ever operate your rental business in San Francisco? A. No, sir.

Q. Is there any reason why you did not operate your business in San Francisco?

A. Well, I found out that the trailers weren't legal for California highways for private use.

Q. By trailers you mean these low bed trailers we just spoke about? A. Yes.

Q. What did you find out concerning the California law on that subject?

(Testimony of William Erdwin Schwartz.)

A. Well, I was stopped on that return trip by the Highway Patrol, if I remember correctly, and they advised me that they weren't legal for the highway.

Q. Did you receive a citation, or merely a caution? A. A caution. [171]

Q. Did you proceed to verify the information the California Highway Patrol had given you on that subject?

A. Would you repeat the question?

Q. Did you verify in any way the information which the California Highway Patrol had given you on this subject?

A. After we got back, several days later, we had a Freuhauf representative who came out and inspected the trucks, or the trailers.

Q. Do you recall what was supposedly wrong with these trailers, from the standpoint of the law of California?

A. Well, I recall that they were one foot too wide.

Q. What, if anything, did you then do with such low bed trailers?

A. They were eventually wholesaled, or sold.

Q. Do you recall what happened to any of the other vehicles I have mentioned, other than the low bed trailers?

A. Well, the trucks I found out on the return trip, that they weren't too economical, they were slow and burned a terrific amount of gas.

Q. Prior to the purchase of these vehicles—I

(Testimony of William Erdwin Schwartz.)

will break down the question. Prior to the purchase of the trucks, and by trucks I mean trucks other than any of the trailers involved, had you made any investigation as to what vehicles were available to you at these war surplus sales?

A. Would you explain that question a little bit? I can't [172] quite understand it.

Q. I will be glad to. I will withdraw the question for that purpose. Did you make any kind of a study to see what vehicles were available at the veterans sales, and what the vehicles could or should be used for?

A. I don't recall doing so, sir.

Q. Did you just go to the sales and pick out the items you liked, or did you make up your mind ahead of time which vehicles you were going to purchase?

A. I don't recall anything about that now.

Q. Do you recall how you financed the purchase of these particular items that you purchased at the veterans' sales?

A. Well, I would receive the money from my stepfather, and then pay him back after the business started.

Q. Then is it correct to say you would go to your stepfather and indicate to him you were going to buy five—four or five, whatever the number is—Freuhauf low bed trailers of a certain description, and he would then advance or give you the money, or cashier's check, or other means of payment to use, and you would then purchase such vehicle?

A. Yes; he would make the arrangement.

(Testimony of William Erdwin Schwartz.)

Q. Did you have any discussions you can now recall with Mr. Hougham concerning the type of vehicles you would purchase?

A. I don't recall any, no, sir.

Q. When these vehicles were resold, by whom were they [173] resold?

A. Well, they were resold through Baker's Motor Market, as I recall.

Q. Do you recall whether the title to these vehicles was taken by you in your name upon purchase from the War Assets Administration?

A. No, sir; I don't recall.

Q. You don't recall how title was taken?

A. No.

Q. At such time as the sales were made by Baker's Motor Market, what would then happen to the money received from the proceeds of such sale?

A. Well, it went back to Baker's Motor Market.

Q. Did you receive any part of the purchase price of such vehicles? A. No, sir.

Q. Did you receive directly or indirectly any profit from the sale of such vehicles? A. Yes.

Mr. Conron: Your Honor, that is an argumentative question.

The Court: Well, I don't know what you mean by profit.

Mr. Lavine: I will withdraw the question.

Q. Except for your drawing account upon Baker's Motor Market, did you receive any other kind of money, compensation from Mr. Hougham

(Testimony of William Erdwin Schwartze.)

or Baker's Motor Market at or about this [174] time?

A. No, sir.

Q. Was your drawing account based at all upon the quantity of vehicles that you sold for Baker's Motor Market?

A. No, it was not.

Q. The drawing account was based upon your reasonable needs, is that correct?

A. Whenever I needed it, yes.

Q. When did you first meet Mr. Owen Dailey, a defendant in this action, Mr. Schwartze?

A. I believe it was at Baker's Motor Market.

Q. Do you recall whether it was shortly after you returned from military service?

A. Yes.

Q. Do you recall whether you had any conversation with Mr. Dailey concerning your proposed venture in San Francisco?

A. No, sir.

Q. Do you recall making any trip to San Francisco to make arrangements for the truck rental business, other than your trip to San Francisco to fill out this application, which is Plaintiff's Exhibit 76?

A. No, sir.

Q. Did you obtain any city license in the City and County of San Francisco, to conduct a trucking rental business at that time?

Mr. Conron: Objected to as asked and answered. [175]

Mr. Layine: I believe, your Honor, the question previously was as to the City of Bakersfield.

The Court: That is my recollection. I will overrule the objection.

(Testimony of William Erdwin Schwartz.)

A. Would you repeat the question?

The Court: The question is did you obtain a business license from the City and County of San Francisco to operate the truck rental business there?

The Witness: No, sir.

) Q. (By Mr. Lavine): Did you drive all the trucks yourself from San Francisco to Bakersfield?

A. No, sir.

Q. Do you recall who, if anybody, helped you drive those vehicles? A. I don't recall now.

Q. Could they have been, or were they employees of Baker's Motor Market?

A. No, I don't recall anybody at this time.

Q. Do you recall whether they were people hired by Baker's Motor Market to get those trucks to that destination?

A. Yes, they could have been mechanics, or somebody of that sort, that was picked up to do that.

Q. Will you describe further to us what type of truck rental business you proposed to operate in the San Francisco area? [176]

The Court: Hasn't he explained that, Mr. Lavine?

Mr. Lavine: Very well, your Honor, I will withdraw the question. No further questions.

(Testimony of William Erdwin Schwartz.)

**Cross-Examination**

By Mr. Conron:

Q. I believe you told us that you entered the military service, Mr. Schwartz. In what branch did you serve? A. Air Force.

Q. And did you receive an honorable discharge from the service? A. Yes, sir.

Q. And what was your rank when you were discharged? A. Flight officer.

Q. And I believe you said you met your father in Arizona— A. Yes.

Q. —shortly after being discharged.

A. Yes.

Q. What did you and he do then?

A. We went on a tour around the country, different sales.

Q. What kind of sales do you have in mind?

A. Surplus property, government.

Q. What part of the country did you travel in, what states and what cities?

A. I don't recall any certain place, it was all over.

Q. What do you mean by all over? [177] Germany?

A. No, no, it was in the United States.

Q. Well, give a few of the cities that you attended sales.

A. Well, St. Louis, I believe.

Q. Did you attend a war surplus sale there?

A. I believe so.

(Testimony of William Edwin Schwartze.)

Q. Where else? A. San Francisco.

Q. Texas? A. I don't recall any.

Q. Missouri?

A. It is possible; I am not certain.

Q. You just don't remember the particular locations? A. No.

Q. About how many sales did you attend on this tour?

A. Well, I don't have any idea actually.

Q. Could you give us an approximation? More than a half a dozen? A. I believe so.

Q. More than a dozen?

A. I couldn't tell you exactly.

Q. Well, approximately? I am not asking you exactly.

A. Well, approximately a dozen, maybe.

Q. Now, during this trip did you see the possibilities of a truck rental business?

A. Yes. [178]

Q. You saw these veterans and the dealers having trouble getting their commodities away from the supply centers? A. Yes.

Q. And that was where you got your idea to enter into this so-called truck rental service?

A. I believe so.

Q. And you had in mind operating not only in San Francisco, but up and down the state, at all the war surplus centers? A. That is right.

Q. Now, Mr. Lavine has shown you the application that you made for a veteran's priority cer.

(Testimony of William Edwin Schwartz.)

tificate. I believe he showed you Exhibit 76, is that the exhibit number, Mr. Clerk?

The Clerk: 76.

Q. (By Mr. Conron): In preparing this application, Mr. Schwartz, did you answer all the questions required of you by the representative that you applied to for a preference? A. Yes.

Q. Was your father present at the time you made this application? A. No, sir.

Q. Did you consult with him specifically with reference to any of the contents of the application? A. No. [179]

Q. To your knowledge did he have any knowledge of the statements which you made in this application? A. I don't believe so.

Q. At the time you signed this application, did you bona fide intend to enter a truck rental and servicing business? A. Yes.

Q. And did the arrangement contemplate that anyone except yourself would share in the profits to be derived therefrom? A. No.

Q. How were you to repay your father?

A. I was after the business started pay him whatever I could.

Q. Now, Mr. Schwartz, do you recall applying for any other veteran's priority certificate than Exhibit 76? A. No, sir, I didn't.

Q. And in making this application, you asked upon this application for five trucks, weapons carriers; nine heavy duty Diamond T trucks, and 15 Freuhauf low bed 22-ton trailers? A. Yes.

(Testimony of William Edwin Schwartz.)

Q. So far as you know that is the only application that you had any priority for?

A. That is right.

Q. You told us a bit about finding out that the Freuhauf trailers were too wide for highway use. What did you do [180] after you found this out, Mr. Schwartz?

A. Well, we contacted Freuhauf, I believe, and they sent a man out to make an estimate on remanufacturing.

Q. Do you recall meeting Mr. Elgar, the gentleman sitting to the right of Mr. Hougham? Or do you know him personally?

A. I don't know him, no.

Q. Do you recall seeing him in connection with this Freuhauf inspection?

A. I have seen him but I don't recall now.

Q. But you do recall an engineer coming up and checking over the equipment? A. Yes.

Q. And did you make any investigation to ascertain what it would cost to legalize the over-size trailers? A. Yes.

Q. Was the figure that was quoted an economical figure for you to consider? A. No, sir.

Q. And was that the reason why you gave up your venture? A. Yes.

Q. Because you had no trailers, and the trucks were uneconomical for further use for you?

A. That is right.

Q. Mr. Schwartz, did you in 1946, or at any other time, [181] conspire or agree with your father

(Testimony of William Edwin Schwartz.)

that he could use your veteran's priority certificate to obtain war surplus property? A. No, sir.

Q. Did Mr. Hougham select and specify from the circulars the articles that appear in the complaint, alleged to have been purchased by you?

A. No, sir.

Q. Did Mr. Hougham cause you to make any certification of any character to the War Assets Administration, or to the Veterans, in order to secure such veteran's certificate of preference?

A. No, sir.

Q. Did Mr. Hougham cause you to certify or represent that you had an enterprise already established? A. No, sir.

Q. Did Mr. Hougham cause you to certify that you were the only person financially interested in the enterprise? A. No, sir.

Q. Or that the funds for the enterprise were being put up by you? A. No.

Q. Or that you were not purchasing the property for the benefit of any other enterprise?

A. No, sir.

Q. Broker or merchant. Did Mr. Hougham cause or suggest [182] to you to represent, if you did, that the enterprise was one in which more than 50 per cent of the capital invested, or the net income, was owned by or would accrue to you? Did he cause you to make any such representation, if you did?

A. No, sir.

Q. Did Mr. Hougham cause you to certify that the statements made in the application were true?

(Testimony of William Edwin Schwartz.)

A. No.

Q. As far as you know, did Mr. Hougham have any knowledge that any representations made by you were false, if any may have been?

A. No, sir.

Q. In making the application, did you bona fide believe that the statements you made in the application were true? A. Yes.

Q. And to the best of your present knowledge and belief they were true, is that correct?

A. Yes.

Q. Did you ever at any time intend to conceal any material fact from the government in making that application? A. No, sir.

Q. Or in purchasing the Diamond T trucks or the Freuhauf trailers? A. No, sir.

Q. Or any of the other articles, if you did make a purchase? [183] A. No, sir.

Q. Now, Mr. Schwartz, bearing in mind your observation of the way business was conducted at the Baker's Motor Market in the year 1946, in your opinion was that an orderly businesslike business?

A. Yes, it was.

Q. And were the prices fair?

A. They were.

Q. And did Mr. Hougham's operation result in the distribution of surplus commodities to the general public in Kern County and elsewhere?

A. Yes.

Q. Now, you stayed with Baker's Motor Market through the year 1946? A. Yes.

(Testimony of William Edwin Schwartz.)

Q. And through the year 1947?

A. I don't recall in 1947—I believe I went into farming in '47.

Q. All right, after you left Baker's Motor Market you went into farming. Did Mr. Hougham still continue to grubstake you in the farming business?

A. Yes, and he still is.

Q. And he has still assisted you from then to this day? Is that right?

A. Yes. [184]

Q. Now, as a result of your association with your father, from the time of your separation from the service, do you believe that the assistance which you have received from him enabled you to rehabilitate yourself from military to civilian life?

Mr. Lavine: To which I object, your Honor, as being immaterial to the issues of this case.

Mr. Conron: That is the purpose of the Act.

The Court: I will overrule the objection, for what it is worth. Do you understand the question?

The Witness: Yes.

The Court: All right.

A. Yes.

Mr. Conron: I have no further questions.

Mr. Lavine: No further questions.

Mr. Conron: I have no further questions, your Honor. That is all, Mr. Schwartz.

(Witness excused.)

The Court: Call your next witness.

Mr. Lavine: Will the Clerk call Mr. McFarland.

**HARLAN L. McFARLAND**

one of the defendants, called by the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name.

The Witness: Harlan L. McFarland.

The Clerk: Have that seat there. [185]

**Direct Examination**

By Mr. Lavine:

Q. Mr. McFarland, you are one of the defendants in this action? A. Yes.

Q. Did you know Mr. Hougham prior to World War II? A. Yes, I did.

Q. Do you recall how long you have known Mr. Hougham?

A. Ever since I was a youngster.

Q. Prior to World War II did you reside in Bakersfield, California? A. Yes, sir.

Q. And were you employed in any particular occupation prior to World War II?

A. I was in the automobile business.

Q. Your own, or somebody else's?

A. In partners with my mother.

Q. What is the name of that motor vehicle establishment? A. McFarland Motors.

Q. Where is it located in Bakersfield?

A. It is located at 1200 East 19th Street.

Q. Approximately when was that business established? A. Since 1933.

Q. Do you recall when you entered the military service of the United States? [186]

(Testimony of Harlan L. McFarland.)

A. July, 1942.

Q. Also Air Force? A. Air Force.

Q. Do you recall when you left the active service of the United States? A. May, 1945.

Q. Did you know Owen Dailey prior to World War II? A. Yes, I did.

Q. Do you recall how long prior to World War II? A. No.

Q. Did you know William E. Schwartz prior to World War II?

A. I met Mr. Schwartz, I believe, during the war years.

Q. Now, you testified you returned from active military service in May, 1945. Did you go back to Bakersfield? A. Yes, I did.

Q. And did you re-enter the operation of McFarland Motors? A. Yes, I did.

Q. And what kind of business did that consist of, in May, 1945, and '46 and '47?

A. It is a used car operation, selling used cars and trucks.

Q. Do you rent any trucks, or cars?

A. No, we don't.

Q. Do you put them into operating condition before you sell them, or do you have that operation done by some other [187] company?

A. We do it ourselves, and also outside.

Q. They do the work you can't perform?

A. That is right.

Q. After you returned from military service, do you recall having any conversation with Mr.

(Testimony of Harlan L. McFarland.)

Hougham concerning any purchase of surplus military vehicles?      A. Yes.

Q. What was such conversation, or conversations?

A. Due to the fact that the automobile business at that time, speaking of the passenger cars, to secure merchandise that one could sell, a dealer or individual would have to enter into the black market or over the ceiling prices of the automobile to buy a passenger car, but the trucks at that time were still able to be bought and sold within the present ceiling at that time.

Q. Did you come to any agreement, or any kind of a business venture with Mr. Hougham, at or around that time?      A. In what respect, sir?

Q. Did you make any kind of a business agreement with Mr. Hougham, concerning the purchase of vehicles at surplus property sales, during the years 1945, '46 and '47?

A. To the point he would be interested in buying any vehicles that I would be able to secure.

Q. Did you make any kind of arrangement as to what [188] prices he would pay you for such vehicles you might purchase?

A. At that time a standard accepted price on wholesale transactions from one dealer to the other, the selling dealer retained a ten dollar profit, over cost and handling.

Q. At that time did he suggest that you buy such vehicles, using your veteran's priority?

A. Not for his benefit.

(Testimony of Harlan L. McFarland.)

**Q.** What did he suggest to you?

**A.** That he would be a buyer for vehicles if I bought the type of merchandise he could use.

**Q.** Did he suggest that you might be able to obtain a better kind or priority by using your veteran's priority?

**A.** No, that wasn't discussed, no.

**Q.** You knew of your own knowledge without him having to tell you? **A.** Yes.

**Q.** Did you make any arrangement with him as to the financing of such vehicles?

**A.** To the point of buying on the war surplus sales to get outside financing from any of the banks or finance company, their procedure of flooring for a dealer buying in war surplus at that time was considered too hazardous for them for a profitable operation, and I could not get financing from any independent bank or lending agency, to buy merchandise at the sales. [189]

**Q.** In other words, the banks would not lend you any money based upon any flooring arrangement secured by war surplus vehicles, and you had to have independent means of financing to work it, is that correct? **A.** Yes.

**Q.** Did you at any time work on a salary for Baker's Motor Market?

**A.** Prior to my leaving for active duty in the military service.

**Q.** Subsequent to your return from military service, did you ever work for a salary for Baker's Motor Market? **A.** No, I didn't.

(Testimony of Harlan L. McFarland.)

Q. Did you ever have any financial interest in that establishment? A. No, I haven't.

Q. Did you make any arrangement with Mr. Hougham as to how he was to finance the purchase of such vehicles? By that I mean, vehicles of surplus property sales in which you exercised your veteran's priority?

A. Would you repeat that question?

(Question read.)

A. To the point of the—at the time of the purchase of the vehicle you had to have the cash available to pay for the units, and I retained the ones I wanted for myself.

Q. All right. Do I understand that you were planning [190] to go to a sale, and, say, contemplated buying five vehicles, say for \$1,000. Would Mr. Hougham then either advance the cash, or arrange for cashier's checks, sufficient for you to purchase those five vehicles totaling \$5,000?

A. If it was over the amount I had myself at that time.

Q. You would finance it in part yourself, and he would make up the difference, is that correct?

A. Yes.

Q. And did he charge you any interest upon such advance of capital? A. No.

Q. Did you pay him any service charge in lieu of interest for such capital? A. No.

Q. How would you return such capital to him, assuming you did?

(Testimony of Harlan L. McFarland.)

A. Capital that was advanced by him for the sale?

Q. Advanced by him for such purchase?

A. If it was units—if the units I purchased they were sold back to Mr. Hougham.

Q. Let me see if I understand that. You would buy a vehicle for, let's say, \$1,000. He would give you a cashier's check for that \$1,000. You would then take the vehicle so purchased, take it to Baker's Motor Market, and he would sell it, and he would then give you \$10 for that vehicle, is [191] that correct? For such vehicles as were sold through him?

A. On that basis, yes.

Q. Now, for vehicles that were taken by you to your own establishment, the McFarland Motors, that is vehicles purchased at these veterans sales, how would you repay Mr. Hougham for such transactions?

A. If—at the time the unit was sold Mr. Hougham was then repaid the amount of money, but the car, if I had already sold the car—

Q. You already sold the car.

A. —to Baker's Motor Market.

Q. All cars were sold to Baker's Motor Market?

A. No.

Q. Some were retained by McFarland Motors, is that right?

A. I beg your pardon. On the units that I kept myself, they were my units, my money invested in them.

Q. I see. It is only the vehicles on which he ad-

(Testimony of Harlan L. McFarland.)

vanced the money that you took to Baker's Motor Market. Do you recall the vehicles which were mentioned this morning—

The Court: Are you making a statement, or asking a question? Let's read it back.

(Question read.)

✓ Mr. Lavine: Did the witness answer the question? Let me pause.

Mr. Conron: His Honor's observation was, is that a statement [192] or a question.

The Court: You better withdraw the question.

Mr. Lavine: I will withdraw the question and ask it again.

Q. Do you recall what portion of the vehicles purchased by you at war surplus veterans' priority sales was paid for by Mr. Hougham?

A. I couldn't recall the amount that were paid for by Mr. Hougham.

The Court: I think we will take our afternoon recess at this time.

(A short recess.)

Q. (By Mr. Lavine): Referring now, Mr. McFarland, only to purchases made by you at veterans' sales in which you exercised your veteran's priority, is it your testimony that for some vehicles you furnished the capital, is that correct? A. Yes.

Q. For certain of the other purchases at such sales Mr. Hougham financed the capital, is that correct? A. Yes.

(Testimony of Harlan L. McFarland.)

Q. I show you Plaintiff's Exhibit 96, which purports to be a statement made by you on May 6, 1947, which has been stipulated into evidence, and I ask you to read that statement.

Did you make such a statement to the F.B.I. agent, Robert J. Emonts, on or about May 6, [193] 1947? A. Yes, I did.

Q. Was this statement typed by you?

A. No.

Q. Were the corrections on this statement made by you in ink? A. Yes.

Q. Is this your signature on the second page of such exhibit, Harlan L. McFarland?

A. Yes, it is.

Q. I direct your attention to the statement appearing in the second paragraph, which reads as follows:

"Inasmuch as I had previously wholesaled cars through Hougham although he had no financial interest in my business nor I in his, he suggested that if I would purchase Army Surplus Automotive equipment he would supply all the money for the purchases."

Was that the agreement with you and Mr. Hougham dated in 1946? A. Yes.

Q. I further call your attention to the statement in paragraph 3, on the first page of such statement:

"I do not recall the exact figures but I believe that I obtained approximately 25 vehicles on this certification at various sales throughout 1946. All money for these purchases was supplied by [194]

(Testimony of Harlan L. McFarland.)

Hougham under our original agreement whereby he made all necessary repairs to place the merchandise in salable condition and paid me a commission only on the sales of those items which I actually retailed. I believe that I sold about half of these items either off of his lot or mine and the other half were sold by him."

Now, which statement is correct, the statement made here that he advanced all the capital for these purchases on veteran's priority sales, or your statement this afternoon in which you stated something other than that?

A. This statement is correct but—

Mr. Conron: Your Honor, I object to the question as argumentative, and it fails to assume the record, or place the record in its true perspective. The statement Mr. Lavine just quoted from is Mr. McFarland's comment in reference to 25 trucks; in evidence, and on his certificate the record shows that he secured other trucks than the 25 trucks referred to in that statement.

The Court: Well, I think what we ought to do, Mr. Lavine, is to break down the separate parts in the statement that you feel are inconsistent. I think it is really up to the Court to determine the veracity or integrity of statements if they are inconsistent, rather than the witness. But I think you better break it down, instead of having a number of [195] statements, break them down into separate parts.

I will sustain the objection to that question.

(Testimony of Harlan L. McFarland.)

Q. (By Mr. Lavine): Going back to the statements you made previously when I asked you as to who supplied the capital, who did supply the capital for the approximately 25 vehicles secured on the certification referred to by you in the Exhibit 96, dated May 6, 1947?

A. Mr. Hougham.

Q. Did Mr. Hougham supply the capital for all other vehicles purchased by you on veterans' priority sales?

A. No, he didn't.

Q. In other words, do I understand your testimony is he just supplied the capital for 25 vehicles purchased by you under the veterans' priority sales?

Mr. Conron: That question is also argumentative; it is not his testimony.

The Court: Well, let's find out exactly what the testimony is of the witness on that subject.

Mr. Lavine: Would the reporter please read the question?

(Question read.)

The Court: I think I will overrule the objection. That is apparently Mr. Lavine's understanding of your testimony. Now, if it is, say so; if it isn't, why, say so. If you want to make any explanation, you may do so. [196]

The Witness: Thank you.

The Court: Do you understand the question?

The Witness: Yes, I do.

The Court: All right.

A. For the document that you have, that you are

(Testimony of Harlan L. McFarland.)

referring to, on those units that are referred to, Mr. Hougham furnished the capital to purchase them, because I was buying and reselling, and I had the units resold prior to their purchase, if I could be fortunate enough to secure them.

Q. (By Mr. Lavine): There has been placed in evidence this morning some sales documents, referring first of all to some 12 highway trailers, 1943, bomb rack, one ton, WB 56, four-wheel trailers. Do you recall who supplied the capital for the purchase of such highway trailers?

A. I couldn't at this time, on just number and description.

Q. Is your answer the same on some nine bomb carrier trailers, one ton, 1944, Model 1, four-wheel with bomb rack and electric brakes?

A. Are you asking me if I can recall where the money came from to purchase those particular units?

Q. Yes, do you know where the money came from to purchase such trailers?

A. No, sir, not just by the number of the [197] units.

Q. There next follow in our pleadings, and I believe in the evidence of sales vouchers, some 29 trucks of various tonnages and make. Do you recall at this time who supplied the capital for the purchase of such trucks at veterans' priority sales?

A. Do you know the locations?

Q. I shall have to refer to the sales documents themselves. Referring now to a Dodge 1942 truck,

(Testimony of Harlan L. McFarland.)

referred in transaction No. 12, Exhibit 150, commercial and recon.,  $\frac{3}{4}$  ton, drive 4x4. Do you recall who supplied you with the capital for the purchase by you of such trucks?

A. No, sir, I don't.

Q. Referring now to Exhibit 149, a Chevrolet 1942 truck tractor, one and a half ton, drive 4 by 4. Do you recall who supplied that capital?

A. No, I don't.

Q. 148, Army truck, Dodge, 1943, ambulance, three-quarter ton, drive 4 by 4. Is your answer the same? A. Yes.

Q. Truck, GMC 1942 cargo, two and a half ton, drive 6 by 6. Do you recall who supplied such capital? A. No, I don't.

Q. Exhibit 146, transaction No. 8, truck, GMC 1942, van, two and a half ton, drive 6 by 6. Is your answer the same? A. Yes, sir. [198]

Q. The next is a series of trucks of various weights, first is a Dodge 1941, one-half ton; next—I am referring in all cases to transaction 7, A through T, respectively. Apparently, your Honor, there are various makes and weights of trucks, and I will put the question to you at the end of the list for the purpose of shortening it, unless Mr. Conron has an objection. The next is 7-B, truck, military, Dodge, 1942, three-quarter ton truck. The next is truck, military, Dodge, 1942, commercial recon.,  $\frac{3}{4}$  ton, drive 4 by 4. Next is a truck, military, Dodge, 1942, commercial recon. three-quarter ton, drive 4 by 4. The next is military truck, Dodge,

(Testimony of Harlan L. McFarland.)

1942, commercial recon., three-quarter ton, drive 4 by 4. The next is truck, military, Dodge, 1942, commercial recon., three-quarter ton, drive 4 by 4. The next is truck, military, Dodge, 1942, commercial recon., three-quarter ton, drive 4 by 4. The next is truck, military, Dodge, 1942, commercial recon., three-quarter ton, drive 4 by 4. The next is the same as I just mentioned. Next is likewise the same model and tonnage. The next item, 7-K, is the same; next, 7-L, the same; next, 7-M, the same; the next, 7-N, the same except Dodge 1942, same commercial recon., three-quarter ton; the next is the same 1942 military truck, Dodge, 1942; next is the same, 7-P; 7-Q is the same; 7-R is the same. Next is an Army truck, Dodge, 1943, recon., one-half ton, drive 4 by 4, that is 7-S. The last, 7-T, is Army truck, Dodge, 1941 recon., one-half ton, drive 4 by 4. [199]

Is your answer on all these vehicles that you do not remember who put up the capital at this time?

A. By the description of the vehicle, just by number, I can't truthfully answer the question as to who put up the capital for the purchase of the units.

Q. Would it assist you in recalling if I were to have you examine these complete files?

A. No, sir.

Q. Would your answer be the same to the other trucks—not the trailers, just the trucks, referred to this morning, when I read off the exhibits?

A. Would you repeat that?

(Testimony of Harlan L. McFarland.)

Q. Perhaps it would be simpler if I asked seriatim. On transaction 6, Exhibit 125, this is a truck, military, Chevrolet, 1942, tractor, one and a half ton, drive 4 by 4. Is your answer the same?

A. Yes.

Q. Next is a truck Oilfield International, two and a half ton, no cab, truck; is your answer the same?

A. Yes.

Q. Next is a trailer, bomb carrier, 1944, one ton four-wheel trailer. Is your answer the same?

A. Yes.

Q. 4-A is trailer bomb carrier, one ton, Model 1, 1944, four-wheeler. Is your answer the same? [200]

A. Yes.

Q. Next is trailer, tank Rosman, 300 gallon, two-wheel; trailer; is your answer the same?

A. Yes.

Q. Next is a trailer, tank Rosman, 300 gallon water trailer; is your answer the same?

A. Yes.

Q. Next is 3-A, trailer, tank Rosman, 300 gallon water trailer; is your answer the same?

A. Yes.

Q. The next transaction 2-F, 2-E, 2-D, 2-C, 2-B and 2-A, in all cases in the "2" series, we refer to bomb carriers, one ton, 1944, Model 1, four-wheel trailers. Is your answer the same?

A. Yes.

Q. Next transaction 1-L, 1-K, 1-J, 1-I, 1-H—withdraw that 1-H—in each of the items in the "1" series down to and including 1-I that I just men-

(Testimony of Harlan L. McFarland.)

tioned, these are trailer Anthony, 1943, bomb rack, trailers. Is your answer the same?

A. Yes, sir.

Q. Item 1-H, is a trailer, Highway Trailer Co., 1943, one-ton trailer. Is your answer the same to that? — A. Yes.

Mr. Conron: Your Honor, I think this line of cross-examination is unduly repetitious. Mr. McFarland stated 15 [201] minutes ago that he couldn't identify any article by serial number alone, as to whether or not Hougham put up the money, or it came from another source.

The Court: Well, I also understand the witness to say that if he examined the sales documents that are in court here and marked by exhibit numbers that he couldn't tell the source of the money. That is my understanding of his testimony.

Mr. Conron: Yes.

The Court: You have almost completed, I guess, your ad seriatim examination, and if you want to finish it, all right.

Mr. Lavine: Very well, your Honor.

Q. 1-G, 1-F, 1-E, 1-D, 1-C and 1-B, up to the point where I started, 1-H to 1-B, in all cases are trailer, Anthony, 1943, bomb rack, four-wheel trailers. Is your answer the same? A. Yes.

Q. 1-A is a Highway trailer, 1943, bomb rack, one ton four-wheel trailer. Is your answer the same to that? A. Yes.

Mr. Conron: Could I interrupt one moment? Your Honor, I have a witness, Mr. Elgar, here, of

the Freuhauf people, and I would like very much—his testimony will be short, and if we are going to extend court further I have no interruption, but if you intend to recess about the time you did [202] yesterday I would like to put him on.

The Court: May I inquire how much longer—

Mr. Lavine: May I suggest, I am going to a little different line of questioning, and this might be a convenient time for Mr. Conron to break in. It is all right with me, your Honor.

The Court: All right.

Mr. Conron: Would you step down, please?

(Witness temporarily excused.)

Mr. Conron: Mr. Elgar.

### WILBURN ELGAR

called as a witness by defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name.

The Witness: Wilburn Elgar.

The Clerk: Have that seat there.

### Direct Examination

By Mr. Conron:

Q. Mr. Elgar, where do you reside?

A. Residence address?

Q. Yes.

A. 3705 Peckham Avenue, Bakersfield.

Q. In Bakersfield. And how long have you lived in Bakersfield?

A. Thirty-five years. [203]

(Testimony of Wilburn Elgar.)

Q. And what is your present business or occupation?

A. I am now a manufacturer's representative and leasing, automotive and industrial leasing agent.

Q. And where is your place of business?

A. 401 Golden State Highway.

Q. And have you had experience in the automobile and truck business in the past?

A. Yes.

Q. Tell the Court a little bit about your experience in that regard.

A. Well, I have been in the automobile—I don't remember who came first, Dodge Brothers or I. I have been a franchise dealer since 1926, and was associated with Bakersfield garage, Dodge distributor of trucks in Kern and adjacent counties since about 1927 through 1944, at which time we relinquished the dealership, and at that time we had in the dealership Kenworth and Freuhauf trucks and trailers as well as Dodge.

Q. And how many years of association did you have with the Freuhauf people?

A. Well, we closed our dealership in Bakersfield, I went with Freuhauf as factory representative from 1944 through '53.

Q. So during the year 1946 you were a representative locally of Freuhauf Trailers? [204]

A. I was resident at Bakersfield and working for five counties and Los Angeles.

Q. You are acquainted with Mr. E. B. Hougham?

A. Yes.

(Testimony of Wilburn Elgar.)

Q. And do you know his stepson, Mr. Schwartz?

A. I have met Mr. Schwartz, yes.

Q. Do you recall, Mr. Elgar, an event in the year 1946 about the spring of the year, of receiving a call from Mr. Hougham in reference to some Freuhauf trailers?

A. Yes.

Q. And did you go make an inspection of those trailers?

A. Yes, we did.

Q. And did you find them to be too large for highway use?

A. Well, you are just speaking about one instance. Of course, we did work continually for Mr. Hougham and the other dealers.

Q. Well, I am directing your attention now to a group of five—four or five Freuhauf trailers in the early spring of 1946.

A. Do you recall—are you asking me to identify a particular trailer?

Q. No, not any particular one, but being called in reference to them?

A. Yes, we were.

Q. I have in mind a group of low-bed Freuhauf 22-ton [205] trailers.

A. Yes, I recall some of that type of equipment.

Q. And did you go and examine those trailers?

A. Yes, we ran the field engineering on those trailers to try and determine whether they could be made legally useful.

Q. And as a result of your study did you find that it was uneconomical to convert them to highway use in California?

A. Yes, our machine and remanufacturing costs

(Testimony of Wilburn Elgar.)

would be beyond the new cost of civilian built units.

Mr. Conron: You may cross-examine.

**Cross-Examination**

By Mr. Lavine:

Q. Do you recall, Mr. Elgar, whether Mr. Hougham called you in to examine those trailers about 1946? A. Yes.

Q. Was there any mention made by Mr. Hougham as to whose trailers these were?

A. No, sir, not to my knowledge. I was just assuming, one group of trailers is the same as any other to me.

Q. Do you recall on that occasion whether you saw Mr. Schwartz at Baker's Motor Market, during your examination of such trailers?

A. Well, I had met Mr. Schwartz, just whether at that particular time I couldn't answer.

Q. You don't recollect at this late date, is that correct? [206] A. No, sir.

Mr. Lavine: No further questions.

Mr. Conron: Thank you, Mr. Elgar.

The Court: That is all, Mr. Elgar. You are excused from further attendance.

The Witness: Thank you.

(Witness excused.)

The Court: Mr. McFarland, will you resume the stand?

**HARLAN L. McFARLAND**

one of the defendants, called by plaintiff, having been previously duly sworn, resumed the stand and was examined and testified further as follows:

**Direct Examination**  
**(Continued)**

By Mr. Lavine:

Q. Mr. McFarland, I hand you Plaintiff's Exhibit 97, in evidence, which purports to be a veteran's application for surplus property, case No. 10-A-24063, in the name of Harlan L. McFarland. Would you kindly examine this application?

Mr. Conron: Mr. Lavine, pardon me. Is that Exhibit 97 or 94?

Mr. Lavine: This is 97.

Mr. Conron: We were marking these as we went along and ours says 94.

Mr. Lavine: There is another application marked 94, to which you might have reference, Mr. Conron. [207]

Mr. Conron: Pardon me. Is that application 10-A-24063?

Mr. Lavine: That is correct.

Mr. Conron: Then I have mine mismarked.

Q. (By Mr. Lavine): Is this application in your handwriting, Mr. McFarland?

A. Yes, it is.

Q. Is your signature appended to the reverse side of this application? A. Yes, it is.

Q. I notice in item 2, there first is written down in black pencil 114 Market Street, San Francisco,

(Testimony of Harlan L. McFarland.)

California. Did you ever conduct any business at 114 Market Street? A. No.

Q. San Francisco, California. Do you know anything about that address, at 114 Market Street?

A. No, I do not.

Q. I notice that then there is marked in red pencil through the 114 Market Street, San Francisco, and there is written on top of that 1200 East 19th Street, Bakersfield, California, and right above the item No. 2 and below No. 1 is written, in someone's handwriting "new address." Is the handwriting in red pencil your handwriting?

A. No, it is not.

Q. Do you know whose handwriting it is for the material marked in red pencil? [208]

A. No, I don't.

Q. Was such in red pencil marked there at your request? A. I don't recall.

Q. Did you ask anybody to strike out 114 Market Street, and put down 1200 East 19th Street?

A. No, I don't remember the address on that.

Q. You do not remember the address of 114 Market Street? A. No.

Q. You do not remember the address 1200 East 19th Street?

A. I certainly do. That is my business address.

Q. But you have no knowledge how 1200 East 19th Street, Bakersfield, got on this application, is that correct? A. No, I don't.

Q. Item No. 4 states "McFarland Motors, 2401 East 14th Street, Oakland, Alameda, California."

(Testimony of Harlan L. McFarland.)

Have you ever conducted a business at 2401 East 14th Street, Oakland, California?

A. No, I have not.

Q. Do you know what business is located at 2401 East 14th Street? A. No, I don't.

Q. Do you know anyone at that address?

A. No.

Q. Do you have any idea how—withdraw that. You did enter 2401 East 14th Street on that application, is that correct?

A. I printed it, yes. [209]

Q. Do you recall Mr. Hougham suggested you write in 2401 East 14th Street, Oakland, California?

A. No, I do not.

Q. Have you ever received any communication from 2401 East 14th Street? A. No.

Q. Have you ever written any letter to that address? A. No.

Q. Have you ever made a telephone call to that address? A. No.

Q. Have you ever met anybody from that address? A. No.

Q. Passing down to the item 7 next, you state "is the enterprise already established" and there is written in there, apparently some kind of erasure, but evidently there is a "yes" there. Did you testify that you had an enterprise already established at 2401 East 14th Street, Oakland, California?

A. That is not my writing.

Q. The "yes" is not in your handwriting?

A. No, it is not.

(Testimony of Harlan L. McFarland.)

Q. And is the "no" in your handwriting?

A. No.

Mr. Lavine: It apparently is a different handwriting, your Honor. [210]

Q. You state here, "How and when do you plan to start your operations if you are starting a new enterprise or buying into an existing enterprise?" and the answer is, "As soon as stock can be purchased."

A. That is my printing.

Q. Was it your intention to start an enterprise at Oakland, California?

A. No, never.

Q. Was it your intention to start an enterprise in San Francisco, California?

A. No.

Q. You state in item 8, at present there were two people in the enterprise. Who were those two persons?

A. Myself and one employee.

Q. Do you recall the name of that employee?

A. A Mr. Warren.

Q. Further on, in the same item 8, you state you anticipate in three months there will be five persons employed.

A. Yes, that is my handwriting.

Q. Did you so intend and state there should be five persons in the enterprise in three months?

A. Yes.

Q. To your knowledge did you receive the items which you requested in No. 10, or any of them?

A. I don't recall the particular items. [211]

Q. Turning over to the opposite page, referring now to item 18, and I am reading only in part, were you directly the sole proprietor of the enter-

(Testimony of Harlan L. McFarland.)

prise described on the opposite page? A. Yes.

Q. Was your mother associated with you in that business?

A. Yes, in the original partnership.

Q. Was she a partner of yours at this time?

A. Not on the automobile dealer part, no.

Q. I understand this McFarland Motors is a different one from the McFarland Motors that you were operating in Bakersfield, is that correct?

A. There is only one McFarland Motors that I know of.

Q. Well, page 1, in a number of items you refer to McFarland Motors that you are going to establish, is that correct?

A. I never had any intention of starting McFarland Motors in Oakland.

Q. Well, did you intend starting McFarland Motors any place in California?

A. There was one operating in Bakersfield.

Q. Did you intend to start any new McFarland Motors, other than the enterprise already established in Bakersfield? A. No.

Q. Now, on or about this date, March 20, 1946, was [212] your mother a partner of McFarland Motors, in Bakersfield?

A. I can't recall the dates on that, March '46.

Q. During this period of time, was she continuously a partner of yours in this business?

A. Yes.

Q. And do you recall what proportion of the

(Testimony of Harlan L. McFarland.)

capital of that business she owned in the partnership?

A. She had nothing in the partnership.

Q. Capital?

A. Capital had been removed from the business.

Q. She had no capital in the partnership. Did she have any profit sharing interest in the partnership? A. None whatsoever.

Q. Would you specify in what respect she was a partner then, on or about those dates, Mr. McFarland?

A. To the fact that McFarland Motors, she had during my absence, the period I was in the service, she had liquidated the business down to nothing in the line of inventory.

Q. So far as your accounting methods are concerned, your mother at this time had no capital interest and no past interest in the profits? Is that correct? A. Right.

Q. And she had no future interest in any profits to be derived thereafter, is that correct?

A. Correct. [213]

Q. Was she to share in any losses of McFarland Motors? A. No.

Q. Was she in fact a partner during this time?

A. Well, a partner only in the point of being named as a partner of record.

Q. She was a nominal partner, we might say, is that a good description? A. Yes.

Q. Reading further on item 18, were you in-

(Testimony of Harlan L. McFarland.)

directly the sole proprietor of the enterprise described in this application?

A. I beg your pardon?

Q. Were you indirectly the sole proprietor of the enterprise described in this application?

A. I was the sole proprietor.

Q. Both directly and indirectly?

A. Yes.

Q. Was there any other person, other than veterans, having any proprietary interest in this enterprise?

A. None whatsoever.

Q. Was there any other person, other than veterans, or yourself, having any interest in more than 50 per cent of the gross profits or income of such enterprise described herein?

A. No.

Q. Was all this property to be used in and as part of the enterprise described herein? [214]

A. It was bought for resale.

Q. Both for Hougham and yourself? Withdraw that. Both for Hougham and others?

A. Yes.

Q. And did you read the certificate before you signed it?

A. No, I did not.

Q. They just handed it to you and you filled it out and signed it without reading it?

A. That is correct. I don't remember reading it.

Q. Could you have read it?

A. I could have.

Q. I next show you Plaintiff's Exhibit 94, which is clipped into this folder, and I ask you to read that application, which is case V-33-D-33964, dated July 2, 1946.

Is this application in your handwriting?

(Testimony of Harlan L. McFarland.)

A. It is.

Q. Is the signature on the reverse side your signature? A. Yes, it is.

Q. Do you have a mailing address at 1200 East 19th Street, Bakersfield, Kern County, California?

A. Yes, I do.

Q. That is the location you have described for McFarland Motors? A. Yes.

Q. I am referring now to the reverse of this certificate, [215] item 18, if I asked you questions on 18, on this certificate, identical with the ones I asked on the previous certificate, would your answers be the same? A. Yes, they would.

Q. Did you read this certificate before you signed it? A. I don't remember reading it.

Q. But you could have read it, couldn't you?

A. Yes.

Q. Have you ever known a person named Frank Murphy? A. No, sir.

Q. Do you know if Frank Murphy was ever connected with Bank Motor Sales in Oakland?

A. No, sir.

Q. Did you ever obtain any business license for the City and County of San Francisco to engage in any kind of a business?

A. No, I didn't.

Q. Did you ever fill out an application for such license in the City and County of San Francisco?

A. No, I did not.

Q. At such times as you went to the veterans' sales, in which you exercised your veteran's pri-

(Testimony of Harlan L. McFarland.)

ority, do you recall who paid the expenses of such trips?

A. I generally paid my own expenses.

Q. There were occasions when you did not pay your own [216] expenses?

A. Yes, there were.

Q. Who paid your expenses on such occasions?

A. Baker's Motor Market.

Q. Are you able to differentiate between the occasions on which they paid and the ones on which you paid?

A. When I was traveling alone.

Q. What do you mean, alone?

A. Singular.

Q. Do I understand if you were traveling with Mr. Hougham or his representative they would pay; if you were traveling by yourself you would pay; is that correct?

A. Yes.

Q. At such time as you were to go to sales and make purchases for vehicles to be transferred directly to Mr. Hougham, did he pay the expenses, or did you?

A. Mr. Hougham ultimately paid the expenses.

Q. And for the vehicles which were delivered by you, or rather for you to McFarland Motors, on 19th Street, did you pay for the reconditioning of such vehicles?

A. I paid for my own reconditioning on my own cars.

Q. For the vehicles which you delivered, or caused to be delivered to Baker's Motor Market, did you pay for the reconditioning of those vehicles?

A. Not separately, no. [217]

(Testimony of Harlan L. McFarland.)

Q. Separately or any other way, did you pay for them? A. Yes, I did.

Q. In what way did you pay for the reconditioning?

A. On the price that the automobile was consigned to me.

Q. Would you describe how you reached a price of resale to Mr. Hougham on the vehicles purchased at veterans' sales, which were transferred to Mr. Hougham?

A. I resold the automobile—

Mr. Conron: Pardon me. I object to the form of the question, it is ambiguous and unintelligible.

The Court: I think we want the questions so that we all understand them:

Mr. Conron: As I understood it, he is talking about resale to Mr. Hougham, and that assumes that there had been a sale to Mr. Hougham.

The Court: Well, as I understand the question, in the instance of vehicles which had been acquired by you from the government on a veteran's priority sale, and which you had sold to Mr. Hougham, and in the instance in such cases where somebody had to repair the car before it was available for sale—Let me ask you first, did you have anything further to do with that vehicle after you transferred it to Mr. Hougham and after he had, say, repaired it, put it in condition for resale? Or are my questions ambiguous and unintelligible? [218]

The Witness: I wouldn't have anything to do

(Testimony of Harlan L. McFarland.)

with any vehicle after it had been sold to Mr. Hougham.

The Court: I see.

Q. (By Mr. Lavine): Mr. McFarland, I show you the original of a deposition taken of you on behalf of the plaintiff on February 24, 1956, filed in this court September 24, 1957, and I show you page 28 of such deposition, and ask you whether this is your signature appended to that deposition?

A. It is.

Q. I read now on page 12 of such deposition, commencing at the top of the page, starting at line 4:

"Q. Then, during 1946, did you make several trips to surplus property sales and make purchases?

"A. Yes, I did."

Did you answer that question in that way?

The Court: Well, there is no conflict, is there, between the present testimony on that question?

Mr. Lavine: No, your Honor, but I desire to offer the witness an opportunity to explain his answer if you determine it is a variation and if he determines it is a variation.

The Court: Well, the question, as I understood it, was whether he had attended veterans' sales, is that it?

Mr. Lavine: Yes, that is true.

The Court: And he said yes. That is the way he testified [219] in court.

Mr. Lavine: The first few questions are preliminary.

(Testimony of Harlan L. McFarland.)

The Court: All right.

Mr. Lavine: To get the tenor of the deposition.

The next question, line 7:

"And at that time, isn't it true, that you obtained your capital from Mr. Hougham?"

The answer shown here is:

"Yes, I bought the units for Mr. Hougham on a commission basis of \$10.00 a unit."

There is typed in there the word "from" and I presume in someone's handwriting it is stricken out and the word "for" Mr. Hougham written in. Did you so testify on that occasion? A. I did.

Q. "Now, was that true with reference to all the different types of sales—the fixed price sale or the Veteran's preference sale?"

"A. The Veteran dealer sales were the only ones that I attended."

Was that your answer on that occasion?

A. Correct.

Q. "That was the only type of sale that you attended—the Veteran dealer sale?"

"A. Yes."

Was that your testimony on that occasion? [220]

A. Yes.

Q. "Q. And if you went to those sales and made purchases it would be with capital supplied by Mr. Hougham?"

"A. Yes."

Was that your testimony on that occasion?

A. Yes.

Q. After you purchased the units at such veter-

(Testimony of Harlan L. McFarland.)

ans' priority sales, would you return to Bakersfield and report to Mr. Hougham what units were purchased by you?      A. Yes, I would.

Q. Did Mr. Hougham sometimes attend the sales with you?      A. On several occasions.

Q. On such occasions would Mr. Hougham pay the expenses of the trip?      A. Yes, he would.

Q. Would you both go and discuss the equipment together on these occasions?

A. Sometimes.

Q. Now, for the trucks you bought with your veterans' preference, on each of such occasions, did you receive some kind of a buyer's bonus from Mr. Hougham, on each of such purchases made by you?

A. On my resale back to him, yes, I did.

Q. Did you receive \$10.00 on each and every vehicle [221] purchased by you?

A. Yes, I did.

Q. After the period of this purchase of vehicles at veterans' priority sales, did you still remain in business as McFarland Motors?

A. Yes, still in business.

Q. Still in business in the same place?

A. Same place.

Q. Do you know Mr. Dailey, defendant in this action?      A. Yes, I do.

Q. Do you recall when you first met him?

A. Prior to World War II.

Q. And did you see him on various occasions at Baker's Motor Market during the years 1945, 1946 and '47—strike that—only 1946 and 1947?

(Testimony of Harlan L. McFarland.)

A. Yes, I did.

Q. And did you converse with him on some of those occasions? A. Yes, I did.

Q. Did you meet Mr. Schwartz prior to World War II?

A. I think it was during the war when I met Mr. Schwartz.

Q. And after the war, in 1946 and 1947 did you see Mr. Schwartz at Baker's Motor Market?

A. Yes.

Q. Did you talk to him on various [222] occasions? A. Yes.

Q. Do you know of your own knowledge if Mr. Schwartz ever intended to go into the business in San Francisco for himself?

A. It was never discussed with me.

Q. Do you recall if you first suggested to Mr. Hougham that you would purchase units for him with your veteran's preference, or was it he who suggested it to you?

A. It was a mutual conversation about how to stay in business.

Q. Turning to your deposition of February 24, 1956, page 20—

The Court: I think we will recess and carry on in the morning.

Mr. Lavine: Your Honor, just for your information I am about finished with this witness.

The Court: Well, there will probably be cross-examination, or redirect, or whatever you call it. Will there not?

(Testimony of Harlan L. McFarland.)

Mr. Conron: There will be your Honor.

The Court.: I think we will recess now, and reconvene at 10:00 o'clock tomorrow morning.

(Thereupon, at 4:25 o'clock p.m. an adjournment was taken until 10:00 o'clock a.m., Thursday, September 26, 1957.) [223]

Thursday, September 26, 1957—10:00 A.M.

The Clerk: Let's see, Mr. McFarland, I think, was on the stand.

**HARLAN L. McFARLAND**

one of the defendants, called as a witness by plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

**Direct Examination  
(Continued)**

Mr. Lavine.: Your Honor, after I sat down last night, after the close of the Court, I realized for the last question or two of Mr. McFarland I inadvertently picked up the deposition of Mr. Schwartze, and not Mr. McFarland, so I would like, with the Court's permission, to have the reporter read back the last question or two and withdraw those questions.

(Record read.)

Mr. Lavine: I wish to withdraw that question referring to the deposition.

The Court: Was there an answer?

(Testimony of Harlan L. McFarland.)

The Reporter: No, the recess was taken then.

The Court: All right, the question is withdrawn.  
Very well.

Q. (By Mr. Lavine): Mr. McFarland, at various times in 1946, did you [226] receive catalogs from War Assets Administration, or its predecessors, advertising the fact sales of war surplus property would be held at such and such a time and such and such a location? A. Yes, I did.

Q. Were you on the mailing list for such application? A. Yes, I was.

Q. Do you recall whether the catalogs were sent to you at McFarland Motors?

A. Yes, they were.

Q. And would you then go and discuss prospective purchases with Mr. Hougham?

A. Yes, I would.

Q. Did you discuss which items you particularly wished to purchase? Is that correct?

A. That is correct.

Q. How would you decide to purchase certain items, and not certain other items?

A. When one is buying for a particular customer it is the duty of that person that is supplying it to watch the movement of the inventory and resupply the items that have been sold.

Q. When you went to the sales following these conversations, would your traveling expenses then be paid by Mr. Hougham? [227]

A. Yes, they would.

Mr. Lavine: No further questions.

(Testimony of Harlan L. McFarland.)

Cross-Examination

By Mr. Conron:

Q. Mr. McFarland, Mr. Lavine asked you yesterday if you could identify certain sales. I believe he asked you the question first, did you during 1946 and 1947 make purchases, and you said yes. He then asked you, did the money come from your personal funds or from Hougham, and you said "part from mine and part from his funds," is that right?

A. Yes, I did.

Q. Now, if Mr. Lavine had asked you could you identify the source of the funds which you used for the purchases you made in 1946, would your answer have been different?

Q. Yes, it would have.

Q. Do you know the source of the funds that you used to make your purchases in 1946?

A. Yes, I do.

Q. What is that source?

A. From Mr. Hougham.

Q. Now, Mr. Lavine asked you, I believe, went through all of the exhibits in reference to the transactions, and he asked you if you could identify the source of the funds by the vehicle?

A. Yes. [228]

Q. And you said you couldn't? A. Yes.

Q. Had he asked you to identify the purchases by dates, could you have so identified them?

A. Yes, I could have.

(Testimony of Harlan L. McFarland.)

Q. Now, when you testified yesterday in reference to those various folders, had you examined those folders in detail at all? A. No, sir.

Q. And did you have it in your mind that these folders might possibly have contained the date, when you answered that you could not gain assistance from the folders? A. No, I did not.

Mr. Conron: Mr. Clerk, I hand you here an envelope that will contain six photographs; and I will ask you to mark that as Defendants' Exhibit A for identification.

(The envelope referred to was marked as Defendants' Exhibit A, for identification.)

Q. (By Mr. Conron): Mr. McFarland, I show you here six photographs that I have asked the Clerk to later enclose in an envelope as Defendants' Exhibit A for identification, and ask you to look at those photographs. Have you ever seen them before? A. Yes, I have.

Q. Do you know who took the pictures? [229].

A. I took them.

Q. And when? A. In 1946.

Q. And what do they depict?

A. They depict the stock on my used car lot in Bakersfield.

Q. The used car lot that is in those pictures is McFarland Motors used car lot in Bakersfield?

A. Yes.

Q. As it existed in 1946?

A. Yes, it is.

(Testimony of Harlan L. McFarland.)

Q. I see some heavy duty trucks and trailers, and so forth. Are those articles of war surplus such as we have been discussing?

A. Yes, they are.

Mr. Conron: I offer Defendants' Exhibit A into evidence.

Mr. Lavine: No objection.

The Court: They will be received, and the group will be Defendants' Exhibit A, the six pictures.

(The photographs heretofore marked as Defendants' Exhibit A for identification were received in evidence.)

Q. (By Mr. Conron): Have you told us when you first entered the used car business, Mr. McFarland? A. Yes. [230]

Q. When was that? A. 1933.

Q. At that time, I believe your mother was in the business? A. Yes, sir.

Q. And you had a brother? A. Yes, sir.

Q. He also was in it? A. Yes, he was.

Q. And he has since passed away?

A. Yes.

Q. You carried on with your mother?

A. Yes, sir.

Q. And when the war broke out you entered the service? A. Yes, sir.

Q. And from 1933 to the war you were here at McFarland Motors, the place in that picture, carrying on a used car business? A. Yes, I was.

Q. And what branch of the service did you enter?

(Testimony of Harlan L. McFarland.)

A. I was in the Air Force.

Q. And when were you separated from the service? A. May, 1945.

Q. Were you honorably discharged?

A. Yes, I was. [231]

Q. At the time of your discharge what rank did you bear? A. Second lieutenant.

Q. Now, prior to entering the service, did you have any business transactions with E. B. Hougham? A. Yes, I did.

Q. From time to time you would purchase articles from his lot, or supply him articles from your lot? A. Yes, I did.

Q. And did you ever work for him as an employee before entering the service?

A. Yes, I did.

Q. For how long?

A. For just a short time prior to my leaving for active duty.

Q. A few weeks or so? A. Yes.

Q. Now, after you came out of the service, what was the state of your business, in reference to having a supply for sale on your lot?

A. My mother had reduced the used car lot down to an inactive status, and I didn't have any merchandise to sell on the lot.

Q. And did you have any money to acquire stock with, your own personal account?

A. Yes, I did. [232]

Q. And did you acquire any stock?

A. I couldn't buy any passenger cars without

(Testimony of Harlan L. McFarland.)

going into the black market field.

Q. Now, did you discuss this situation with Mr. Hougham? A. Yes, I did.

Q. And did you and he work out an arrangement whereby he consigned to you articles of merchandise owned by him for you to resell upon your used car lot? A. Yes, he did.

Q. Now, as a result of that arrangement when an article would be consigned to you, would Mr. Hougham have a price net to him fixed on the article? A. Yes, he did.

Q. And what would you do with the merchandise after that?

A. I would mark it up and sell it.

Q. Now, with reference to the mark up between Hougham's cost price to you and your resale price to the customer, did Hougham share in any way in that spread? A. No, he did not.

Q. Did Hougham have anything to do with leasing or owning the property on which your used car lot was conducted? A. No.

Q. Paying the light bills, gas bills?

A. Nothing.

Q. Paying for the employees on your lot, if any? [233] A. No, sir.

Q. Now, did you say you were separated from the service in 1945? A. Yes, sir.

Q. And you entered into this arrangement with Hougham soon after coming out of the Army, is that right? A. Yes, I did.

(Testimony of Harlan L. McFarland.)

Q. And I take it that was long before this priority to veterans business started out?

A. Yes, it was.

Q. And your arrangement with Mr. Hougham, as far as your consigning arrangement, in its inception had nothing whatsoever to do with the fact that you might later purchase articles of war surplus under priority, is that right?

A. That is right.

Q. Now, in the spring of 1946, did it come to your attention that it was possible for veterans to purchase war surplus used cars on a priority basis?

A. Yes.

Q. And did you make an application for such a certificate?

A. Yes, I did.

Mr. Conron: What are the numbers?

Mr. Hamilton: 97 and 94.

Q. (By Mr. Conron): I show you Plaintiff's Exhibit 97, which you discussed [234] yesterday as being the first application for a priority certificate that you made on or about March 20th of 1946. Mr. Lavine questioned you rather extensively about questions number 4 and 5. Question No. 4, your Honor, being trade name of enterprise, McFarland Motors; question 5 being address of enterprise, 2401 East 14th, Oakland. Now, Mr. McFarland, I am going to ask you—I don't suppose you have any independent recollection right now, this minute, as to whether or not you personally did make that entry in that application with your own hand, do you? Independent recollection?

(Testimony of Harlan L. McFarland.)

A. It looks like my writing.

Q. Do you have any independent recollection?

A. No.

Q. Now listen to my questions and answer them. I am going to ask you to compare the printing on questions No. 4 and No. 5, with the printing in question No. 6. I will ask if you can't, on careful examination, notice a distinct different in that printing? A. Yes.

Q. You do know that this is your printing in question No. 6? A. Yes.

Q. And the printing in question No. 6 compares with the printing in questions 7, 8, 10, does it not?

A. Yes. [235]

Q. But it does not compare with 4 and 5? There is a distinct difference in the slant and the type, of characters, is there not? A. Yes.

Mr. Conron: I would like to have your Honor examine that. (Handing to Court.)

The Court: All right.

Q. (By Mr. Conron): Now, in July you applied for a second priority, did you not, which appears in folder, Plaintiff's Exhibits 94 and 95; is that right?

A. Yes.

Q. You gave your address as 1200 East 19th Street. Was that your address at that time?

A. That is right.

Q. Bakersfield, Kern County, California. That is a true statement, is it not? A. Yes.

Q. Gave the name of the enterprise as McFarland Motors? A. Yes.

(Testimony of Harlan L. McFarland.)

Q. Was that a true statement? A. Yes.

Q. Had been since 1933? A. Yes.

Q. And the address is 1200 East 19th Street, Bakersfield, [236] Kern County, California?

A. Yes.

Q. That is a true statement?

A. That is right.

Q. Description of enterprise, automobile dealer?

A. Right.

Q. Is that a true statement? A. Yes.

Q. You had dealt in automobiles since 1933?

A. Yes.

Q. And you have a dealer's license number down there. You did have a dealer's license?

A. Yes, sir.

Q. Is enterprise already established, you answered yes. Is that a true statement?

A. Yes, it is.

Q. Are you now operating it? A. Yes.

Q. Is that a true statement? A. Yes.

Q. You stated you wanted 25 trucks. Was that a true statement? A. Yes.

Q. Is there anything that appears on that Plaintiff's Exhibit 94 in your own handwriting that is in any way untrue? [237] A. No, sir.

Q. Now, directing your attention to the language in question 18, you had nothing to do whatsoever with formulating that language?

A. No, I did not.

Q. Now, did you read it carefully before you signed it? A. No, I didn't.

(Testimony of Harlan L. McFarland.)

Q. Did you realize that it contained the statement: "I am not procuring the property listed in this application for the purpose of resale."

Did you have any idea that blank contained that statement, when you signed it?

A. I certainly did not.

Q. As a matter of fact, you disclosed on the face of the document that you did intend to use the trucks for resale purposes as a dealer, isn't that right?

A. Yes, it was.

Mr. Conron: Could I have the exhibit for a moment, your Honor?

The Court: Yes.

Q. (By Mr. Conron): Mr. McFarland, your Exhibit 97 appears to have a correction in red ink in reference to the address. Do you have any independent recollection as of now as to how that correction came about? [238]

A. No, I don't.

Q. You can't recall it at all?

A. No, sir.

Q. Specifically, do you know whether it was made before the document was finally signed by you, at the time you signed it, or at a later date? Do you have any recollection on that?

A. No, I don't.

Mr. Conron: Mr. Clerk, I hand you two photographs I would like to have you mark for identification as Defendants' Exhibits B and C, respectively.

(The photographs referred to were marked as Defendants' Exhibit B and C, respectively, for identification.)

(Testimony of Harlan L. McFarland.)

Mr. Conron: If the Court please, I do not have foundation evidence for these photographs, and I neglected in our pretrial negotiations to call them to Mr. Lavine's attention, but I have during recess explained to him how they came into my possession, and it is as follows: When this address business came up, I was as curious as anybody to find out everything I could about it, so I hired a process man in San Francisco to go to 525 Jones Street, and to the Oakland address, and take a picture, if there was an actual number at those addresses. I did this three years or so ago, after this litigation, of course. It was not in 1946. And Defendants' Exhibit B is the photograph of the Jones Street address, which I will offer in evidence, if [239] Mr. Lavine will accept my foundation statement.

Mr. Lavine: Based upon the statement of Mr. Conron that it was taken under his direction, I waive any further foundation evidence.

The Court: It will be received.

(The photograph heretofore marked as Defendants' Exhibit B for identification was received in evidence.)

Mr. Conron: And Exhibit C is the Oakland address. It doesn't amount to much, but they are addresses of automotive businesses. They are not just an address taken out of the sky, which is what I had in mind.

The Court: They will be received and given the same numbers.

(Testimony of Harlan L. McFarland.)

(The photograph heretofore marked as Defendants' Exhibit C for identification was received in evidence.)

Q. (By Mr. Conron): In reference to both of the priority applications, Mr. McFarland, that I have shown you, was Mr. Hougham present when you filled out either of those applications?

A. No, he was not.

Q. Did he counsel or advise you in respect to any reference to any statement made in either of those applications?

A. He did not.

Q. To your knowledge, did he ever become aware of the contents of the application prior to the time this action was [240] filed?

A. No.

Q. Now, Mr. Lavine showed you a list, read it off to you, of the articles that are set forth in the complaint that you couldn't identify specifically by name or number. It is a fact, however, that you do admit and never have denied purchasing articles similar in character and volume to those set forth in the complaint, is that correct?

A. Yes.

Q. But your memory is such that you cannot specifically identify them in detail at the present time?

A. That is right.

Q. And you have no records that would assist you in that regard, that you have maintained to date?

A. Right.

Q. And the source of the funds that you used to make those purchases was from Mr. Hougham?

A. Yes, it was.

(Testimony of Harlan L. McFarland.)

Q. And you considered the funds you received from him as an advance to you in the nature of a loan, is that right? A. Yes.

Q. When you dealt with the government, you purchased in your own name, is that not right?

A. Yes, I did.

Q. And the articles that you had purchased you sold to [241] Mr. Hougham?

A. Yes, I did.

Q. And there was a spread between the cost of the merchandise to you from the government and the sale price that you received from Mr. Hougham? There was a difference between those two figures, is that right?

A. Yes, there was.

Q. You retained that difference yourself?

A. Yes, I did.

Q. Hougham had no individual right to participate at all in that spread, is that right?

A. He did not.

Q. Now, of these articles that you did purchase with your priority certificates, were some of them later consigned to you by Hougham for sale by you on your used car lot to the general public?

A. Yes, they were.

Q. Percentagewise, can you give us the figure on value, or what proportion of the purchases you made from the government you resold on your own account after they were consigned to you by Hougham? A. Oh, well over half of it.

Q. And of those articles, they were consigned

(Testimony of Harlan L. McFarland.)

to you with a price on the lot? A. Yes.

Q. By Hougham? [242]

A. That is right.

Q. You fixed the resale price to the public?

A. Yes, I did.

Q. According to your judgment of what the market would bear, is that right?

A. That is right.

Q. And there was a spread between that price and the price the public paid?

A. That is right.

Q. Did Hougham participate in any way in that spread? A. He did not.

Q. In conducting these sales on your lot, did Hougham have any obligation to pay for the rent of the property? A. He did not.

Q. Or the lights, gas, and water?

A. Nothing.

Q. Or the employees that you used?

A. No.

Q. Now, coming back to percentagewise just for a minute, you had other articles on your property for resale than those purchased by you from the war surplus, did you not? A. Yes, I did.

Q. And you had other articles on your property for resale that were consigned to you by Hougham, the source of which Hougham received from other places than through [243] veterans' preference certificates, did he not? A. Yes, I did.

Q. Can you tell, percentagewise, what proportion

(Testimony of Harlan L. McFarland.)

of your business, your total volume of business to the public one hundred per cent-wise; what proportion of that had its inception in merchandise secured from veterans' preference certificates?

A. I beg your pardon?

Mr. Conron: Read the question. If you don't understand it, I will reframe it.

(Question read.)

A. Very small.

Q. Five per cent? Ten per cent?

A. Five per cent.

Q. All right, Now, Mr. McFarland, do you feel that in 1946 that you entered into a conspiracy of any kind with Ben Hougham for the purpose of improperly securing war surplus property?

A. Definitely not.

Q. I believe you told us Mr. Hougham never indicated to you in any way, in any wise, how to fill out your priority application?

A. That is right.

Q. Mr. Hougham, I take it, did not cause you to certify that the enterprise was one in which more than 50 per cent of [244] capital or net income would accrue to you, if any such representation was made; is that right? A. No.

Q. So far as you know, did Mr. Hougham have any knowledge of any representations made by you that were false, if any were? A. No.

Q. And as far as you personally know and believe and feel, you made no false representations

(Testimony of Harlan L. McFarland.)

of any kind to the government? A. I did not.

Q. At any time. Did you intend to conceal any material fact from the government in making your application, or in purchasing the articles that you purchased under your priority certificate?

A. No.

Q. Is it true that at the time of signing this application you bona fidedly believed you were the owner of a business enterprise? A. I did.

Q. And as a matter of fact you did own a business enterprise? A. I did.

Q. Now, in making the application and in purchasing those commodities, for whose benefit were you acting? [245] A. For my own.

Q. And you did in fact receive the benefit from the transactions? A. I did.

Q. Now Mr. McFarland, from your experience as a used car dealer, and your observation of Baker's Motor Market, in your opinion was that an orderly businesslike conducted enterprise, Baker's Motor Market?

A. I think it was very well run.

Q. And is that true during the year 1946?

A. Yes, sir.

Q. Was the merchandise offered for sale there, the war surplus Mr. Hougham had, that was distributed to the general public through his sales, is that not right? A. Yes, sir.

Q. And the prices at which it was distributed, were they fair and equitable prices?

A. They were.

(Testimony of Harlan L. McFarland.)

Q. Now, as a result of your association with Mr. Hougham, since coming back from the service, do you feel that his activity in your behalf enabled you to rehabilitate yourself from military to civilian life? A. It did.

Mr. Conron: That is all.

Mr. Lavine: May I have 94 and 97, please? [246]

### Redirect Examination

By Mr. Lavine:

Q. Mr. McFarland, I notice the first application which you made out, which is Exhibit 97, is dated March 20, 1946. I believe Mr. Schwartz testified earlier that, and I believe his application shows that his application was also March 20, 1946. Do you recall whether you and Mr. Schwartz filled out your applications together at the same time?

A. No, I don't.

Q. Do you recall whether you and Mr. Schwartz went to San Francisco together to fill out your applications? A. Yes, we did.

Q. Did you travel in the same vehicle?

A. Yes, we did.

Q. Was that your car, or his car, or some other car?

A. I don't recall; I believe it was the train.

Q. Do you recall discussing with Mr. Schwartz anything about your prospective use of veterans' preferences to obtain vehicles? A. No.

Q. Could such a conversation have taken place

(Testimony of Harlan L. McFarland.)

between you? A. I don't think so.

Q. Were you and Mr. Schwartz in the same room at the time the applications were filled out?

A. No. [247]

Q. You were in different rooms at the time?

A. Yes.

Q. Would you describe, if you remember, in what physical manner you filled out your application?

A. I went in and declared my intent for a veteran's dealer priority, and it was filled out, and that is all.

Q. You state you recollect that Mr. Schwartz was not in the room at the time you filled out your application, is that correct?

A. That is right.

Q. And likewise you were not in the same room when Mr. Schwartz filled out his application?

A. That is right.

Q. Do you recall now whether anyone assisted you or advised you at the time how to fill in the various blanks?

A. The person at the counter.

Q. I show you Plaintiff's Exhibit 97. Is it your testimony that the handwritten portion of line 5 is not in your handwriting, or printing?

Mr. Conron: Just a minute, your Honor, I am going to challenge that question, that is assuming facts not in the record.

The Court: Well, I don't know—

Mr. Conron: I asked him to examine those and

(Testimony of Harlan L. McFarland.)

see if he could observe a difference. He did not say he did or did not [248] write those.

The Court: Isn't this in effect cross-examination by the government?

Mr. Conron: Well, I would take it as redirect. If it is cross, my point is not well taken.

The Court: Or recross-examination. Ordinarily, of course, on recross the question has been assuming a state of facts which may not be in evidence. I will overrule the objection. Do you understand the question, Mr. McFarland?

A. Yes. I—it is similar but I don't remember how the address got on there.

The Court: I didn't hear the answer.

The Witness: It is similar but I don't understand how the address got on there.

The Court: Well, I think the question was, do you know who scribbled it, or do you have any present opinion?

The Witness: It looks like my printing.

The Court: What is that particular item now?

Mr. Lavine: Item 5, your Honor, which is the address of the enterprise, the business, not his mailing address.

The Court: The San Francisco address?

Mr. Lavine: The Oakland address, 2401 East 14th Street, Oakland, Alameda, California.

Mr. Hamilton: Your Honor, here are our copies of those two.

The Court: Oh, thank you. [249]

Mr. Lavine: Is there a question pending?

(Testimony of Harlan L. McFarland.)

(Question read.)

Mr. Conron: If you know?

A. I don't know.

Q. (By Mr. Lavine): You don't know whether this is your handwriting or not, is that your testimony? A. Yes, sir.

Q. I ask you to compare the portion of line 5, Exhibit 97, the last portion which is "Calif" in printing with Plaintiff's Exhibit 94, in two respects, first of all—

The Court: Just a minute. Would you read the question, Miss Schulke?

(Question read.)

The Court: Well, now, are we talking about Exhibit 97?

Mr. Lavine: In the first place, 97, your Honor.

The Court: And you are referring to line 5?

Mr. Lavine: Line 5, the very last portion on the right hand side of the page, that is the letters in the word "Calif."

Q. I ask you to compare that to, first of all, to the "Calif" on paragraph 2 of Exhibit 94, and I ask you whether "Calif" on 97 and "Calif" on 94 I have just mentioned are not the same handwriting?

Mr. Conron: That calls for a conclusion of the witness.

Mr. Lavine: A conclusion, your Honor, on a subject on [250] which he is allowed to give a conclusion.

(Testimony of Harlan L. McFarland.)

The Court: I think so. I will overrule the objection.

Mr. Conron: They do not look the same to me.

The Court: What does the witness say?

Mr. Lavine: The witness has not yet answered the question, your Honor.

A. I am not expert enough to define the handwriting or printing but—I don't know.

Q. (By Mr. Lavine): Referring now to Exhibit 97, the same word "Calif" I ask you to compare that word again now with the "Calif" on line 5 of Exhibit 94, and I ask you whether those two "Califs" on 94 and 97, line 5, respectively—withdraw that—94, line 5 and 97, line 5, respectively, are not in the same handwriting?

Mr. Conron: I note the same objection.

The Court: The same ruling.

A. As I said before, at a glance it looks like my printing.

Mr. Lavine: No further questions.

Mr. Conron: That is all.

The Court: There are a couple of questions I want to ask you. When and where did you first see the form, Plaintiff's Exhibit 97, that is before any data was filled in? Where did you first see it?

The Witness: It must have been at the War Assets office. [251]

The Court: Well, did you determine before you went up there what surplus items you cared to buy?

The Witness: Yes, sir.

(Testimony of Harlan L. McFarland.)

The Court: And how did you conclude to buy the particular items listed on Plaintiff's Exhibit 97? Have you the document before you?

The Witness: No, your Honor.

(Mr. Lavine hands Exhibit to the witness.)

The Witness: 97, your Honor?

The Court: Yes. Will you read the question, Miss Schulke?

(Question read.)

The Witness: Those items I knew I would have quick resale for.

The Court: To whom?

The Witness: To Mr. Hougham.

The Court: You had discussed with him the items that he felt he would buy from you if you were successful in securing them from the War Assets, is that right?

The Witness: Yes, your Honor.

The Court: Now, is it my understanding that with respect to all of the surplus material, automotive, that you purchased in 1946 under your veteran's priority, that you disposed of or sold all of that merchandise to Mr. Hougham, and that about half of it he consigned to you for sale? Is [252] that right?

The Witness: That is correct, your Honor.

The Court: In other words, there was no surplus merchandise that you purchased in 1946 that you sold directly from your own car lot to some

(Testimony of Harlan L. McFarland.)

purchaser other than Mr. Hougham in the first instance? Is that right?

The Witness: That is correct.

The Court: Do you know the circumstances surrounding the signing of Plaintiff's Exhibit 94?

The Witness: By the circumstances?

The Court: Well, you had already signed one application and apparently that had been approved by the proper officer of the War Assets Administration. If you know, why did you sign a second application?

The Witness: It could have been this one was used up, sir.

The Court: Well, is it correct that a veteran having filed an application and listed certain items upon which he cared to bid, would have to sign a new application if he desired to make further purchases?

Mr. Lavine: I cannot answer that question squarely, your Honor. I have nothing in my files, nor have I been able to talk to anybody to give a clear explanation why it was necessary for two applications. However, certainly the second application was proper, and we are not trying to infer in any way that because he had two applications there was [253] anything wrong with it.

The Court: All I am trying to understand is the procedure. In other words, here is my point, for instance, referring now to the third cause of action, item 1, the date is 7-2-46.

Mr. Lavine: Yes.

(Testimony of Harlan L. McFarland.)

The Court: Now, I assume that that was probably the delivery date.

Mr. Lavine: That is probably the date he turned in the document and it looks like it was stamped by the person at the counter, or whoever processed it.

The Court: Well, now there were purchases on 9-16-46.

Mr. Lavine: Yes.

The Court: Was that supported by a new application?

Mr. Lavine: I don't believe the date July 2, 1946, at the top represents in any wise the delivery date of the merchandise. I believe the witness' explanation is more likely, that having used up the— either one of two things, he either used up the amount he initially requested in his first application and it was necessary for additional request by further date and further explanation, or that he anticipated future demand and likewise and properly did file a second application in order to give him a further potential of more vehicles to be used under his veteran's application. From my examination of the regulations and talking to people, his explanation is the more likely one. [254]

Mr. Conron: I think, your Honor, to further answer your Honor's question, I believe the answer to your question is yes, that these applications for priority are for a specified and specific quantity of merchandise and it is so certified. It is the way all these blanks appear to me. For instance, you take Exhibit 94, the one in the folder.

(Testimony of Harlan L. McFarland.)

The Court: Yes, I have it.

Mr. Conron: Underneath the application there is a pink slip here in the original. To clarify what I mean, in this exhibit is a pink slip, one of the exhibits. Now, those are the documents presented to the War Assets Administration as authority to make the purchases, and when the application is signed, that is the white paper, that is turned over now, as a result of that application the veteran then gets the pink slip, which identifies the vehicles, and when they are gone they are gone.

Mr. Lavine: Your Honor will further note on the exhibits for Mr. McFarland, Schwartz and Dailey, that on those pink slips there are various items crossed out, apparently by the processing official, and substitutions made in. You will also note in the correspondence written in on certain of the folders, apparently when they did not have items these veterans requested, other substitute items were suggested and in some cases accepted by the veteran, and the pink slip, if we had a complete set should reflect all those transactions. [255]

Mr. Conron: Does that answer your Honor's inquiry?

The Court: Yes, I think that answers my question. I think that is all I have. That is all, Mr. McFarland.

The Witness: Thank you.

Mr. Conron: Just a minute, Mr. McFarland.

(Testimony of Harlan L. McFarland.)

Recross-Examination

By Mr. Conron:

Q. Mr. McFarland, you have told us of the purchases you made of war surplus material you made in 1946. You sold the merchandise you had so purchased to Mr. Hougham, that is correct?

A. That is correct.

Q. Now, let's look at the character of this merchandise that you bought from war surplus. Was all of it in fit condition to immediately resell to the public?

A. Definitely not.

Q. And did some of it have to be remodeled or reconverted or altered in order to make it economically attractive to the public market?

A. Yes, it did.

Q. Tell us a little bit about that. What type of articles were remodeled and what repairs would have to be made upon them? Generally give the type?

A. I think I can recall on the command cars, they had to be completely chopped in half, flat rack beds made for [256] them. If the market demanded a longer wheel base, frames had to cut, frames stretched. On all of the one and a half ton vehicles they were too short wheel base for market, they had to have the frames stretched, the military bed thrown away, flat rack beds put on them, transmission differentials.

Q. How about the bomb carriers?

(Testimony of Harlan L. McFarland.)

A. Well, the bomb carriers had to be completely refabricated and special tanks made for them, to make water tanks out of them.

Q. Now, Mr. Hougham had a shop or facilities to have this work done?

A. Yes, sir, he did.

Q. And you didn't?

A. No, I did not.

Q. And it would have been impossible for you to resell those articles to the general public without those alterations, is that a fact?

A. Absolutely impossible.

The Court: Well, is my understanding correct from the testimony, that the difference between your price, the amount you paid the government, and the amount that Mr. Hougham paid you, was \$10; is that right?

The Witness: Yes, your Honor.

The Court: In each instance?

The Witness: Yes, your Honor. [257]

The Court: And that was regardless of the condition of the vehicle?

The Witness: That is right.

The Court: I have no further questions.

Mr. Conron: That is all. Thank you.

Mr. Lavine: No further questions.

The Court: I think we will take our morning recess at this time.

(Witness excused.)

(Short recess.)

The Court: Call your next witness.

Mr. Lavine: Will the Clerk call Mr. Hougham to the stand.

**EDWARD B. HOUGHAM**

one of the defendants, called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name.

The Witness: Edward B. Hougham.

The Clerk: Have that seat there.

**Direct Examination**

By Mr. Lavine:

Q. Mr. Hougham, you are one of the defendants in this action?

A. I am a little hard of hearing.

Q. Mr. Hougham, are you one of the defendants in this [258] action? A. Yes, sir.

Q. During the year 1946, were you the sole owner of Baker's Motor Market?

A. That is correct.

Q. In 1944, did you first start purchasing surplus government trucks, automotive equipment, and trailers?

A. In 1944 I first started purchasing government surplus commodities.

Q. How would you receive notice that certain property was going to be put up for sale by the government?

A. At that time the salvage officer in the various

(Testimony of Edward B. Hougham.)

posts, points of embarkation, had lots of salvage and they issued a letter or an advertisement or brochure, that the salvage officer in the camp would have certain commodities, government commodities for sale.

Q. And what procedure would you use in purchasing such surplus vehicles?

A. What do you mean by procedure? How would I go about it?

Q. How would you go about it?

A. I would proceed to the particular army installation that had advertised the trucks, the trailers, the jeeps, or whatever it was they had for sale, motorcycles; find the salvage officer, and he would, under ordinary circumstances, [259] detail one of his men to take me down to what they called in those days their bull pen, and I would inspect the merchandise, pick up the pieces that I desired to buy, and offer the officer what I could pay for whatever my choice was.

Q. Did you know Mr. McFarland prior to the time he went into service in World War II?

A. Yes, I have known Mr. McFarland ever since he wore knee pants.

Q. Did Mr. McFarland engage in any business operation with you after his return from service in World War II?      A. Yes.

Q. What was the nature of that business arrangement?

A. Well, I think the best way to tell it is to tell you from the beginning.

Q. Would you, please.

(Testimony of Edward B. Hougham.)

A. Well, Mr. McFarland—the McFarland Motor Company had been inactivated some time prior to his return from service, and when he came home he probably came to see me the first or second day he was in town, maybe not particularly for business reasons, but due to the fact we had been friends for many years, and he told me that it didn't look too good about reopening his establishment. So I said, "Well, you better help me with my merchandise. I will give you a complete inventory and you can go to work until you get back in business." And we talked this over, and maybe a week [260] or ten days later—it wasn't done immediately, because he still had some more research to do and more running around—so we came to the conclusion it would be a profitable venture for him to reopen his place on his own power, and sell consigned merchandise from my place.

Q. Did you and he agree that you would stock his inventory with a portion of your own inventory, and after that he went into his own business, is that correct?

A. Will you repeat the question, please?

The Court: Read the question, Miss Schulke.

(Question read.)

A. The question is, did McFarland and myself agree that I would stock him out of my inventory, and then after that he opened his place of business and went into business, is that it?

Q. (By Mr. Lavine): Yes.

(Testimony of Edward B. Hougham.)

A. That is correct.

Q. Do you recall what arrangement was made as to the payment to you for the consigned merchandise?

A. Consigned merchandise is paid for as it is sold.

Q. Let's assume a certain truck was sold by him, such truck being consigned by you to his lot. How would you then share in the profit of such consigned vehicle?

A. This merchandise all had various and sundry amounts [261] of profit in it. Now, to begin with, we will start with the cheap bomb dolly, they cost forty or fifty dollars. Without doing any manufacturing on the bomb dollies when we sold the bomb dolly we probably made twenty, twenty-five dollars gross profit. That we would split.

A piece of merchandise that I had considerable manufacturing on, and we were maintaining between ourselves a standard resale price on all the various types of equipment, of this merchandise; in other words, a Chevrolet 4 by 4 tons and a half truck that had been remanufactured for civilian use in a shop that I put in business for that particular kind of work, cost us considerably more money than we had paid the government, and we would get down to a very nominal profit. So the truck would be consigned to him for maybe \$1,400, and we would have a retail price on both places of \$1,650 on the vehicle, and Mr. McFarland retained the difference

(Testimony of Edward B. Hougham.)

between the \$1,400 and the \$1,650 that he sold the truck for.

The Court: In other words, you fixed the price?

The Witness: We established a fair price.

The Court: Well, first, you fixed the fair price to Mr. McFarland, and then you would fix a price to, we will say, a retail customer?

The Witness: That is right. The truck was consigned to him for \$1,400, and he a price of \$1,650 on it, and if a [262] customer offered him \$1,550 cash, I know he would have taken it.

The Court: I see.

The Witness: He would then have \$150 profit.

The Court: Well, did you have anything to do with fixing his resale price?

The Witness: Well, that was one of our—we didn't fix his retail sales price, or he didn't fix mine, but we had mutually agreed that we would not do any under-cutting or over-cutting; but we would establish a fair price to the customer and maintain it.

Q (By Mr. Lavine): Now in 1946, some time in 1946, did you and Mr. McFarland have a conversation as to the purchasing of vehicles, used vehicles, new vehicles, and so forth, at veterans' priority sales, by the use of veterans's preference by Mr. McFarland?

A. I would not be able to tell you the time or the place, but I am sure we did.

Q. Now, it has been testified by Mr. McFarland that he proceeded to purchase various vehicles.

(Testimony of Edward B. Hougham.)

vehicle equipment at various veterans' sales. Did you supply the capital for all of such purchases by Mr. McFarland?

A. Will you read the beginning of the question?

(Question read.) [263]

A. I am sure that I did in 1946.

Q. Would that be true of any purchases that Mr. McFarland made in 1947, using his veteran's priority?

A. By 1947, Mr. McFarland—

Mr. Conron: I object to that, your Honor, as immaterial, it is without the issues.

The Court: Isn't that true? It seems to me McFarland's were confined to 1946.

Mr. Lavine: Yes, your Honor.

Mr. Conron: The entire complaint, your Honor.

The Court: Yes.

Mr. Lavine: Yes, your Honor, I believe Mr. Conron's correction is in order, since all purchases were in 1946, my question as to 1947 was immaterial, and I will withdraw the question.

The Court: Very well.

Q. (By Mr. Lavine): Was there any agreement between you and Mr. McFarland as to what amount of commission he would retain on the purchase of such veteran's priority vehicles?

A. If he resold to me all the vehicles that he purchased, or any of the vehicles that he purchased?

Q. I am confining my question now only to sales

(Testimony of Edward B. Hougham.)

made to Mr. McFarland using his veteran's preference. Would your answer be the same? [264]

Mr. Conron: I am going to object to the form of the question, because he didn't answer the preceding one.

The Court: Read the question before that, and the answer.

(Record read.)

The Court: I think you better reframe the question. You will withdraw the question?

Mr. Lavine: I withdraw the question.

Q. For those vehicles which were taken by Mr. McFarland, having been purchased at veterans' priority sales, and then brought directly to your lot, Baker's Motor Market, would he receive a \$10 commission on such vehicles?

A. On those vehicles taken by Mr. McFarland? I don't understand.

Q. On those vehicles purchased by Mr. McFarland at the veterans' priority sales, and taken by him directly to your lot, would you pay him a ten dollar commission on each of such vehicles or trailers?

A. May I make a remark there?

The Court: Yes, go ahead.

The Witness: I don't ever expressly remember of Mr. McFarland bringing any vehicles to Baker's Motor Market. This stuff was all shipped by common carrier, with the exception of very rare cases.

The Court: Well, let me frame the question. Now, we are referring only to 1946. [265]

(Testimony of Edward B. Hougham.)

The Witness: Yes, sir.

The Court: We are referring only to merchandise, vehicles of various types, acquired by Mr. McFarland from the federal government, under a veteran's priority certificate.

The Witness: Yes, sir.

The Court: Now, the question is, when that merchandise so purchased arrived at your establishment in Bakersfield, what compensation or profit or commission or however you would term it, did you pay, if any, to Mr. McFarland?

The Witness: Mr. McFarland got his buying fee for each unit, plus his traveling expenses.

The Court: Now, what was that fee?

The Witness: That was ten dollars a unit.

The Court: Does that answer the question?

Mr. Lavine: Yes, your Honor.

Q. Now, as to vehicles which were purchased by Mr. McFarland at veterans' priority sales from the government, which went in some manner to McFarland Motors and were sold from that lot, would Mr. McFarland receive any compensation, commission, bonus or profit from you for the sale of such vehicle?

A. If it went direct to his own institution there would be no way I would know about it, and he would not receive any fruits of his labor from my institution.

Q. Do I understand you testified that you supplied the [266] capital for all veterans' priority

(Testimony of Edward B. Hougham.)

vehicles purchased by Mr. McFarland, whether or not they ended up on your lot or his lot?

A. I supplied all of the capital Mr. McFarland used, so far as I know.

Q. Now, on the vehicles that ended up in his lot, how would you be given back the capital that you had advanced?

A. If they were on his lot I wouldn't know about it; it would be his business. He was not completely broke.

Q. Would he pay you back the capital you advanced him for each of such vehicles?

A. Would he what?

Q. Wouldn't he pay you back the capital that you had advanced for the purchase of each of such vehicles that ended up on his lot?

A. If he purchased the vehicle for himself, privately? Sure, he would pay me back.

The Court: Well, it is my understanding, at least from Mr. McFarland's testimony, that after some merchandise—and I am talking about 1946 again—had been acquired from the federal government and had been delivered in one way or the other to your establishment, it is my understanding that he received this ten dollars per vehicle. Now, it is further my understanding that you might repair or reconvert or make useful for civilian use some of those vehicles, and then they [267] were placed on Mr. McFarland's lot for resale to the general public.

(Testimony of Edward B. Hougham.)

The Witness: Your Honor, I would like to enlarge upon that a little bit for you.

The Court: All right.

The Witness: This business is just the same as the motor car business. To have a representative stock you have to have several of each type of vehicle. We kept, in the fall of '45, all of '46 and most of '47, a strictly representative stock at Mr. McFarland's place of business. We kept a stock, I imagine, on his place of business that was of the value of fifty or sixty thousand dollars of merchandise ready to sell. I had warehouses and storage for the vehicles that weren't processed and weren't ready to sell. When an army vehicle comes in, the first thing that it needs is a set of keys and a battery. The afternoon or the day that they came in, the spark plugs are taken out of them, and we put penetrating oil in the top of the head of the motor. I imagine that 80 per cent of the motors are stuck from sitting. These vehicles hadn't be moved for months and months. The next day, after the key man had been over and made 25 keys for you and fitted the locks, and the batteries had been put in, you start the motors up. Then from there you service it, change the oil, completely grease, and then remanufacture to make the vehicle serviceable for either the farmer or the [268] oilfields. That is the only place they could go. They weren't highway trucks.

The Court: Well, if one of those vehicles that had been so serviced and made useful, ready for sale

(Testimony of Edward B. Hougham.)

to the general public, were taken over to Mr. McFarland's lot——

The Witness: That is right.

The Court: ——and he sold to the general public——

The Witness: That is right.

The Court: ——what arrangement was there, if any, between you and Mr. McFarland in connection with that vehicle? You had already paid him, what you call a buyer's fee, of ten dollars.

The Witness: That is right. He had already earned that.

The Court: All right. Now, what was the arrangement between you and Mr. McFarland when such a vehicle, after being reconditioned or reconverted, was on Mr. McFarland's lot and he sold it to the general public? What arrangement did you have?

The Witness: They went to his place of business three ways. Some merchandise, the cheap merchandise that we didn't have to do anything to, he would get a split on it.

The Court: Yes. As I understand, you would split the difference.

The Witness: We would split the profit.

The Court: Yes. [269]

The Witness: The difference between the wholesale and the retail.

The Court: Yes.

The Witness: On the other stuff, it depended upon the amount of manufacturing it took to put

(Testimony of Edward B. Hougham.)

the truck into condition. Now, we presume that I have a truck that will sell for \$1,750, and I have reconditioned it up to the place it has already cost me \$1,500. There is \$250 left. All right. I would just add \$100 on for myself, because I had no selling expense, it went to his place. And he would take the \$150. In other words, he had a net billing on it, \$1,600. He brought me back either \$1,600 in money or \$1,600 in money and paper. I had to handle all of his truck business.

The Court: And then any amount in excess of \$1,600 he retained for himself?

The Witness: That was it. He was running his own establishment, he paid of his own overhead, and I think when we got into the thing far enough, I think he finally wound up and had one salesman. These boys are paid on a percentage, and he took care of all of his own overhead. It went to him on a net billing.

The Court: Now, that is the second way. You suggested a third?

The Witness: Yes, on the bigger vehicles, where maybe we were losing some money. These vehicles didn't all make [270] money. Maybe we were losing some money. We just tell Harlan, "Well, Harlan, we are stuck here, you can make \$100." That is the way it was handled.

Q. (By Mr. Lavine): Confining my questions now only to vehicles that ended up on the Baker's Motor Market lot, and by that I mean vehicles purchased by Mr. McFarland at veterans' priority

(Testimony of Edward B. Hougham.)

sales, was it agreed that if you sold any such vehicles at a loss that Mr. McFarland would share proportionately in your loss?

A. No, he had nothing to do with the losses.

Q. Any profit less the ten dollars would go to you, is that correct?

A. Any profit what?

Mr. Conron: Just a minute, your Honor. The question is ambiguous in that it fails to distinguish between a transaction where Mr. Hougham purchased from Mr. McFarland, and a transaction where Mr. Hougham sold his equipment to the general public. The question is astraddle.

The Court: It was my understanding, and I may be wrong—let's just assume a truck acquired by Mr. McFarland from the federal government under a priority certificate. It was delivered to your lot. Mr. McFarland received \$10. All right. Now, suppose that that vehicle was reconditioned and reconverted in your own shop, and sold by you, not [271] delivered over to McFarland's lot at all, but sold by you from your lot. Did Mr. McFarland in any way share in any profit or any loss?

The Witness: No. The vehicle was sold by me?

The Court: Yes.

The Witness: And was not consigned to Mr. McFarland?

The Court: Yes.

The Witness: If I made any money on it, the profit was mine. If I lost any money, the loss was entirely mine. It wasn't a maybe deal.

(Testimony of Edward B. Hougham.)

The Court: Now does that answer your question?

Mr. Lavine: Yes, your Honor.

Q. Now, turning to the transactions with Mr. Dailey, Mr. Dailey was employed by you, I understand, after his return from military service in World War II for a period of time. Is that correct?

A. That is correct.

Q. Now, what, if any, arrangement did you have with Mr. Dailey whereby he would purchase war surplus vehicles from the government, using his priority preference?

A. Mr. Dailey was in my employ at a given salary, and at the innovation of priorities, why, we decided it might be well for him to buy some merchandise and he was—got his veteran's dealer permits, and bought and sold trucks to me.

Q. For his own account? [272]

A. For his own account.

Q. You had an oral understanding of this sort with Mr. Dailey, is that correct?

A. I had an oral understanding with Mr. Dailey?

Q. To that effect? A. That is right.

Q. Was there anything in writing that you remember concerning your agreement with him?

A. No, sir.

Q. What was your arrangement concerning the purchase of war surplus material at veterans' priority sales, that you agreed to supply all the capital for such purposes?

(Testimony of Edward B. Hougham.)

A. So far as I know, I supplied Mr. Dailey with all of his capital.

Q. And you had agreed prior to the time he went to the sales that you would furnish him that capital, is that correct?

A. That is correct.

Q. Is it also correct to say that you had this agreement with him prior to the time he made application for a veteran's priority certificate?

A. I think Mr. Dailey was in the office in San Francisco making his application for a veteran dealer's priority, and he called me from San Francisco and advised me that it was necessary to show that he was capable of paying for whatever merchandise he purchased. And I said, "Well, that is all [273] right, that can be arranged. You go to see Mr. Harry Hogan, of the No. 1 branch of the Bank of America, in San Francisco, downtown, and I will have my bank here call Mr. Hogan and tell him that you are O. K. for whatever amount that you deem is necessary to make your purchases." I went down to my banker and explained the situation to him, and told him that I was going to be responsible for this young man. So my banker called Mr. Hogan in San Francisco and okayed it, and Mr. Hogan okayed it to the War Assets Administration, I am sure.

Q. What arrangement, if any, did you have with Mr. Dailey, as to sharing the profits on such war surplus vehicles purchased by him at veterans' priority sales?

A. Mr. Dailey was only to share the profit in my business on an annual basis, and I had hopes that

(Testimony of Edward B. Hougham.)

he and my stepson would some day take over. That is what I had in my mind at the time.

Q. What do you mean when you say Mr. Dailey would share in the profits on an annual basis in your business at Baker's Motor Market?

A. Well, if the business was profitable and the gentlemen are producing and they made money, why, we would declare a little dividend at the end of the year each year.

Q. Is that what is called a Christmas or year end bonus?

A. I don't know what you call it. [274]

Q. What do you call it?

A. Well, I have given it to many of my employees when there was a job well done.

Q. This is not a profit sharing scheme, is it, in which the employees are guaranteed any—

A. No, sir.

Q. —such thing?

A. It would merely depend upon the fact if we had a very profitable year.

Q. Mr. Dailey was not considered by you a partner? A. Not at that time.

Q. Was he considered by you a joint venturer?

A. Considered what?

Q. Was he considered by you to be in a joint venture with you? A. He was an employee.

Q. As an employee. Now, confining my questions only to vehicles purchased by him at veterans' priority sales, wasn't it your agreement that he would re-

(Testimony of Edward B. Hougham.)

ceive ten dollars buyer's commission for each of such vehicles purchased? Is that correct?

A. Ten dollars more than he paid for the vehicle.

Q. And was that to be received by him before or after the vehicle was sold off your lot?

A. We settled, I think, twice a month at that [275] time.

Q. At the same time he received his other salary, is that correct?

A. He received his other salary twice a month.

Q. So that payment of ten dollars might have been before or after the particular vehicle was sold? Is that correct?

A. That has nothing to do with the vehicle.

Q. Were the expenses of his trips to veterans' priority sales borne by you, Mr. Hougham?

A. Yes, sir.

Q. Was Mr. Dailey to bear any losses on any vehicles, such vehicles sold off your lot?

A. No, it was a positive sale, not a maybe deal.

Q. Referring now to your stepson, Mr. Schwartz, in the year 1946 what, if any, was the relationship between you and him with regard to Baker's Motor Market?

A. The same relationship that any man has with his son that comes down and spends his Saturdays and weekends, holidays, from the time he was big enough to drive an automobile until he goes in the army.

Mr. Conron: Mr. Hougham, will you please take

(Testimony of Edward B. Hougham.)

your hand away from your mouth, so we can hear you more distinctly.

The Witness: I get a little flexion in my arm but I will do it another way.

Q. (By Mr. Lavine): During the year 1946, was Mr. Schwartz working full [276] time at Baker's Motor Market? A. Yes, sir.

Q. And was he sharing in the profits of such business?

A. No, he didn't share in the profits.

Q. He was not regarded by you as a partner at that time, is that correct?

A. No, he was not regarded as a partner.

Q. Did you have any agreement with Mr. Schwartz concerning his prospective purchase of war surplus vehicles at veterans' priority sales?

A. He bought surplus at veterans' priority sales for our business.

Q. Did you have any agreement with him prior to this purchase as to how he would go about it?

A. What do you mean, agreement?

Q. Did you and he agree on any plan whereby he could finance the purchase of such vehicles?

A. I financed the purchase of the vehicles.

Q. You agreed before hand to furnish such capital, is that correct?

A. I would have to, because Mr. Schwartz didn't have any money.

Q. Incidentally, didn't Mr. Schwartz have more or less an open drawing account with you for all his reasonable needs?

(Testimony of Edward B. Hougham.)

A. He was treated just like any child in any family at [277] that period. If he wanted a suit of clothes he went down and bought it and charged it either to the business or me personally. He had an open drawing account in the business and the book-keeper was instructed to give him any amount of money he come in and asked for, and if he happened to be out of money and we were in St. Louis, Missouri, he tapped for ten, fifty, out of my pocket.

The Court: He was sort of a typical son, wasn't he, in that respect?

The Witness: Sir?

The Court: Sort of a typical son in that respect?

The Witness: That is right. He is my son.

Mr. Conron: The same condition applies to daughters.

The Court: I know that.

Q. (By Mr. Lavine): Now, upon the purchase of these vehicles purchased by Mr. Schwartz, which ended up in Baker's Motor Market, was it agreed with him that you would sell all of such vehicles at Baker's Motor Market?

A. Would you please state the question again?

The Court: Read the question, Miss Schulke.

(Question read.)

A. That is right.

Q. (By Mr. Lavine): Did you agree that you would retain all the profits [278] of such sales?

Mr. Conron: That question again is compound. It fails to distinguish between a transaction between

(Testimony of Edward B. Hougham.)

Schwartz selling to Hougham, and Hougham selling to the general public.

The Court: Well, let's break it up and find out what arrangement, if any, Mr. Hougham, had with his son regarding any arrangements concerning the acquisition.

Mr. Lavine: Very well. I will withdraw the question.

Q. Did you have any agreement with Mr. Schwartz that he would sell vehicles on his own account? A. No.

Q. Did you have any arrangement with Mr. Schwartz whereby he was going to go into a rental business on his own account? A. Yes.

Q. What were those arrangements?

A. It had come to the notice of all of us involved in this business that the transportation problem of getting our merchandise back to our respective towns was bad. It was tough to get delivery, tough to get them out on time. So we wanted to—we thought it would be a good venture to put Mr. Schwartz in an equipment rental business and a carrier business, so that he could run, facilitate our activities quite a lot, because we would have first choice on his efforts, and there would be plenty of customers for [279] him to do business with.

The Court: I think we will take our noon recess at this time. We will reconvene at 2:00 o'clock.

(Thereupon, at 11:50 o'clock a.m., a recess was taken until 2:00 o'clock p.m. of the same day.) [280]

Afternoon Session—2:00 P.M.

EDWARD B. HOUGHAM

one of the defendants, called as a witness by plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination  
(Continued)

Mr. Lavine: Will the reporter please read the last question and answer?

(Record read.)

By Mr. Lavine:

Q. Did Mr. Schwartze actually enter the truck rental business?

A. In what sense do you mean, sir?

Q. Did he ever in fact rent any trucks in the State of California during the year 1946?

A. Did he ever what?

Q. Rent on his own account any trucks in the State of California to any other person, for his own account?

A. No, he did not.

Q. Referring now to vehicles purchased at veterans' priority sales by Mr. Schwartze, did all those vehicles eventually, to your knowledge, end up at Baker's Motor Market?

A. They all ended up at Baker's Motor Market.

Q. And of those that were sold, all those were sold by [281] you, is that correct?

A. They were all disposed of through my organization.

Q. And all the profits of such sales were allotted

(Testimony of Edward B. Hougham.)

the account of Baker's Motor Market, is that correct?

A. All the profit of the sales were what?

Q. Went to Baker's Motor Market, is that correct?

A. If there was any profit in the merchandise it went to Baker's Motor Market.

Q. And if there were any losses you bore the losses, is that correct? A. That is also correct.

Q. Were all the expenses of putting these vehicles in condition borne by you?

A. Yes, sir.

Q. Now, referring now to the vehicles which Mr. Dailey bought, and which ended up at Baker's Motor Market, did you pay all the expenses of putting those vehicles into good condition for sale?

A. Yes, sir.

Mr. Lavine: No further questions.

#### Cross-Examination

By Mr. Conron:

Q. Mr. Hougham, we have been tossing around the courtroom the words commission, profit, and bonus, as representing whatever the veteran dealer got in the way of monetary reward [282] from you as a result of the transaction of his buying a car from the government and turning it over to you. Now, regardless of what terminology we have used, is it not true that in putting out this money you considered it a personal advance to the individual?

A. That is correct.

(Testimony of Edward B. Hougham.)

Q. And after you advanced the money to him, theoretically there was an obligation or an account payable from him, or receivable to you, for the amount of money?

A. That is right.

Q. After the vehicle had been purchased by him from the government, when title was transferred to you, you gave him credit for the money you had advanced to him?

A. That is correct.

Q. Plus, in the case of McFarland and Dailey, a profit, bonus, or commission, or whatever you call it, of ten dollars?

A. In my mind it was not a commission; it was merchandising profit so far as I am concerned.

Q. Now, let's take this practice of buying and selling it to a dealer. Regardless of the source of the purchase, whether it was from the federal government or from any other source, I will ask you whether it is not true that in the automobile industry there has been a practice prevailing for many years for people who do nothing but specialize in buying cars for used car dealers? [283]

A. That is correct.

Q. There are individuals in the business today who do nothing but that, is that not right?

A. That is correct.

Q. Who go on the open market, locate a vehicle, have in mind a few dealer customers, turn it to that dealer at a small profit?

A. That is correct.

Q. And in that general profession, that type of activity is not limited to war surplus sales?

(Testimony of Edward B. Hougham.)

A. Oh, no.

Q. Dealers of that character deal anywhere they can find the merchandise, is that not right?

A. That is correct.

Q. Not only from war surplus source but from any other available source where the market is favorable?

A. That is correct.

Q. In transactions of that character is it not customary to subsidize the dealer in addition to his profit on the car and his traveling expenses?

A. I don't understand the word "subsidize."

Q. Compensate. A. Compensate?

Q. Yes.

Mr. Conron: Read the question. [284]

(Question read.)

Q. (By Mr. Conron): For his traveling expenses, for meals, and so forth, on trips that he took in order to acquire the deal?

A. That is correct.

Q. That condition prevailed, to your knowledge since you entered the used car business in 1928?

A. Yes, sir.

Q. And it was a customary and accepted method of doing business in the industry clear up to World War II, and after World War II?

A. That is correct.

Q. And it is being followed today?

A. Correct.

Q. Mr. Koenig yesterday told us something about

(Testimony of Edward B. Hougham.)

the market for automobiles generally, being in short supply, in other words, during 1946 the demand for that type of merchandise was greater than the supply, and that was generally true, was it not?

A. Yes, sir.

Q. With respect to certain types of army war surplus material, by reason of their peculiar construction for military purposes, is it not true that there was not a demand greater than the supply for that type of article?

A. Well, you might even go further than that and say there [285] was no demand.

Q. I have in mind command cars. Is that the fact in respect to them?

A. Command cars?

Q. Yes.

A. Originally, until I found out what to do with them myself—I am the man that did it—there was no demand.

Q. Tell his Honor a bit about your experience with command cars.

A. Well, at this period in my business life, in '44, '45, '46, '47 and '48, I was probably away from my business an average of three weeks in the month. I tried to spend ten days there during the month, at the end of the month and over the first of the month. I was home at Christmas in '45, the month of December.

Q. Now, to help you along and speed this up, by that time how many command cars had you acquired?

(Testimony of Edward B. Hougham.)

A. I found that I owned in the neighborhood of 250 command cars, sitting all over the Pacific Coast.

Q. Could you sell them in that condition, in the condition that you found them?

A. The reason that they were sitting, I couldn't sell them.

Q. All right. What did you do?

A. Well, I had about 50 in Bakersfield, so I knew that [286] I was going to have to disassemble them and sell the generators and motors and tires separately as parts or pieces, or manufacture something that was usable. So I got a young man that run a shop, he had done work for me for a long time, and he had four men working for him, and I run ten of these vehicles out to his shop, and he started in to manufacture something that was right in appearance, that would be attractive enough and wouldn't look like a command car; so we could finally make the sale of the piece of merchandise. Well, on about the fourth day, in the third or fourth cut, we came up with a very decent looking half-ton pickup, made entirely out of steel and the parts and pieces of the recon., with a soft sport top, like we had in the early '20s, and and form fitting side curtains, with a real nice looking half-ton pickup box in the back.

So I then made a deal with Mr. Stanfill, at a given price, to take these in lots of ten as fast as I could ship them in, and when he finished the tenth he would have ten more, he wouldn't have to stop. And we started to sell them just like bunches of bananas, because everybody needed a pickup.

(Testimony of Edward B. Hougham.)

Q. After that operation, was there a commercial market for the vehicles?

A. We created a commercial market, because the next sale we went to, I bought an additional 50 command reconnaissance [287] cars for the old price, and the Treasury Department when I returned home, there was a letter there, wanting to know what I was doing with these, because they knew I already owned so many of them. So I sent the United States Treasury Department in San Francisco a series of pictures of what I had done with those command recon. cars, and the next sale I went to they were up, and they were paying \$400 to 500 a piece for them to remanufacture.

Q. Now, how about weapons carriers? Was there any demand for weapons carriers in the commercial market without alteration?

A. You had to clean it up, remanufacture the top on it, remanufacture the side curtains, fix a decent tail gate, and you had a fair commercial vehicle.

Q. Well, what about trailers?

A. Trailers? We had to remanufacture pretty near 100 per cent. The trailer we got was an axle and it was too long for four wheels; it was useless.

Q. What about bomb dollies?

A. The bomb dollies, we remanufactured 90 per cent of them.

Q. What about half-ton 4 by 4 trucks?

A. Well, that would be three-quarter ton, Mr. Condon. We did the same thing. We cut the frame

(Testimony of Edward B. Hougham.)

and started to make them ton and a half [288] trucks.

Q. What about the ton and a half 4 by 4 truck?

A. The Chevrolet one and a half ton army cargo truck was a very attractive truck, but to an ordinary operator the cargo body was useless, the truck was too short. We took those trucks and put six feet in the frame and put in an additional drive line and manufactured a very satisfactory truck for oilfields or farm use, that would carry an 8 by 16 or 8 by 14 bed.

Q. What about two and a half ton 4 by 6 trucks?

A. Well, that was exactly the same operation.

Q. Now, with reference to all of these items that I mentioned, without alteration, was there any market in the general public for these particular types of items, other than to people equipped like yourself to alter and remodel them?

A. No. The public was very badly disappointed, Mr. Public if he went to the sale himself bought a vehicle and took the catalog—

Mr. Conron: No. Just listen to my question. Will you read the question?

(Question read.)

A. The market was negligible.

Q. Now, without going through the complaint in detail, you have read it and you are familiar generally with the character of the items set forth, are you not, Mr. Hougham? [289]

A. Yes.

Q. And included in those articles are command

(Testimony of Edward B. Hougham.)

cars, are there not? A. Yes, sir.

Q. Weapons carriers? A. Yes, sir.

Q. Trailers? A. Yes.

Q. Bomb dollies? A. Yes.

Q. Half ton 4 by 4? A. Yes.

Q. One and a half ton 4 by 4? A. Yes.

Q. Two and a half ton 4 by 6? A. Yes.

Q. Now, I believe you told us that you entered into the automobile business, or did you, about 1928?

A. Earlier than that, Mr. Conron; when I first went in the automobile business?

Q. Yes. A. Fall of '24, I think.

Q. Fall of 1924. Where did you engage in business then? A. Taft, California.

Q. How long did you stay in Taft? [290]

A. Until the midsummer of '29.

Q. Where did you go from Taft?

A. Bakersfield, California.

Q. And what was your first location in Bakersfield?

A. My first location in Bakersfield was the corner of 18th and L.

Q. How long did you remain at that location, approximately? A. Until the spring of 1930.

Q. Then where did you move?

A. Corner of 24th and Chester.

Q. At 24th and Chester, under what name or style did you conduct your business?

A. Baker's Motor Market.

Q. Did you have a partner at that time?

A. I had a partner.

(Testimony of Edward B. Hougham.)

Q. What was his name?

A. Willard E. Baker.

Q. How long were you in business with him, as partners?

A. I bought Mr. Baker out in 1939, I believe.

Q. And from 1939 until you closed the business, you conducted Baker's Motor Market as a sole proprietorship?

A. That is correct.

Q. And you closed about what time?

A. I sold my business in 1952.

Q. So in 1946, '45, '44, '47, you were doing business as [291] sole proprietor at 24th and Chester Streets in Bakersfield?

A. That is correct.

Q. Under the name of Baker's Motor Market?

A. That is correct.

Q. Now, you know Mr. Schwartz, of course.

A. Yes.

Q. He is your stepson?

A. That is right.

Q. How old was he when he came into your family?

A. His mother and myself, I think, were married when he was six years old.

Q. And he has been with you in your family continuously since?

A. That is correct.

Q. And he went to war, World War II?

A. That is correct.

Q. And was separated in the fall of 1945?

A. That is correct.

Q. Honorably discharged?

A. Correct.

Q. Now, about the year 1943, was there any

(Testimony of Edward B. Hougham.)

change in the type of merchandise which you handled at Baker's Motor Market, in '43 and '44?

A. Yes.

Q. And tell the Court what that change [292] was.

A. I changed from civilian merchandise, passenger cars and pickups and light trucks exclusively to army surplus.

Q. Now, you dealt with army surplus commodities starting in 1944, and thereafter into beyond 1946?

A. In 1944. May I make a statement?

Q. Yes.

A. In 1944 that started in volume.

Q. Yes.

A. You could buy enough stuff to stay in business.

Q. And you continued handling war surplus supplies until at least the year 1946?

A. I continued to what?

Q. Handle war surplus supplies through the year 1946 from the year 1944, at least through the year 1946?

A. Exclusively.

Q. And during those years what proportion of the business that you transacted consisted of dealing in war surplus commodities?

The Court: I think he stated exclusively.

Mr. Conron: I just wanted to be sure.

The Court: Was that my understanding?

The Witness: One hundred per cent.

Q. (By Mr. Conron): All right. Now, when you first started dealing in war surplus commodities, I believe Mr. Lavine asked you the method [293] of

(Testimony of Edward B. Hougham.)

purchase and you explained to him that you first started to acquire surplus commodities by dealing with the salvage officers at the embarkation centers, is that correct?      A. That is correct.

Q. All right. You didn't explain to him the balance of the method of acquisition; following that method of acquisition what other methods came into vogue that you used?

A. Well, immediately after that, the surplus commodities were bought from the United States Treasury Department.

Q. And how long a time did the Treasury Department, if you can recall approximately, have charge of disposal of war surplus commodities?

A. I would say over a year.

Q. And they prescribed a certain set of rules and regulations for dealing with them, I presume; is that right?

A. Their rules and regulations were just straight auction to dealers only.

Q. All right. Then did some other department of the government take over the handling of war surplus commodities?

A. I know the department, but I am not certain of the sequence.

Q. All right.

A. Reconstruction Finance Company, I think, at one time was added for about 90 days. Then it went into the Department of Commerce, and from the Department of Commerce it went to [294] the War Assets, and then after that, I think, it became the

(Testimony of Edward B. Hougham.)

War Assets Administration. I think that is the sequence.

Q. Now, isn't it true that each one of these various departments had their own peculiar set of rules as to how the sales would be conducted?

A. That is correct.

Q. There never developed any well known and understood custom or set of rules with reference to the disposition of the surplus material?

A. That is right.

Q. Rules were constantly being changed and in a state of flux during that period?

A. That is correct.

Q. Now, prior to May of 1946, were there any specific priorities extended to veterans in connection with the purchase, or disposition as you choose to put it, of surplus commodities, as far as you know?

A. No. Prior to the early part of 1946, I am not positive of the month—

Q. All right.

A. Prior to the early part of 1946, these commodities were offered to bona fide wholesalers and retailers in the trade, in the automotive trade.

Q. And after this early part of 1946, they created another subdivision giving veteran dealers a priority over [295] general dealers?

A. That is correct.

Q. And that came to your attention, did it not?

A. That is right.

Q. Now, were you ever given any specific definition of what a veteran dealer was supposed to be?

(Testimony of Edward B. Hougham.)

A. No, sir.

Q. Did you know of any specific or detailed qualification that a veteran dealer had to have in order to qualify as a veteran dealer?

A. Outside of having the money to buy with, I don't know of any other qualifications.

Q. Now, getting back to Mr. Schwartz, you recall meeting him shortly after his separation, in Arizona?

A. I picked him up in Phoenix, Arizona.

Q. And did you and he take a trip around the country to attend war surplus sales then being held and conducted?

A. We made our first sale in Phoenix, the second one in St. Louis, Cincinnati, Denver, back down to Nebraska, a town, I forget the name of it, El Paso, and the last one was in Los Angeles, California, before we proceeded to Bakersfield.

Q. Now, on this trip and the others you may have attended, did it come to your attention that there was a field for transportation of this war surplus commodity from [296] these points of business to the dealers' various places of business?

A. That was one of our great dead ends. We were always held up in getting our merchandise back to where we wanted to use it.

Q. And did you and your son discuss the possibilities of him engaging in such a business?

A. Yes.

Q. And did you agree to advance the funds to set him up, get him started?

A. Yes.

(Testimony of Edward B. Hougham.)

Q. Did Bill, with your knowledge, go to San Francisco and apply for a veteran's priority certificate to purchase some equipment? A. Yes.

Q. For use in this business? A. Yes.

Q. Now, I take it the business never actually got under way, is that right?

A. Just a very preliminary part; it didn't jell.

Q. And what was the reason that made it blow up?

A. He purchased what he thought would be enough trucks, known as tractors, and trailers, to start with, and on his preliminary trip he was stopped on the highway by a California Highway Patrolman, and was told that his trailers were [297] strictly illegal for use on the California highways.

Q. Now, you learned that from him when he returned to Bakersfield after his trip? A. Yes.

Q. Did you do anything about endeavoring to find out what could be done with the trailers to make them usable on California highways?

A. May I have the question again, please?

(Question read.)

A. I called Mr. W. J. Elgar, who at that time was the Freuhauf representative in Kern County, and asked him to make a survey of these vehicles, and see if they could be remanufactured so that they would be legal and usable for highway work.

Q. With what result?

A. The cost of remanufacturing was exorbitant.

(Testimony of Edward B. Hougham.)

and it would have been more economical to have bought brand new civilian trailers.

Mr. Conron: Now, could I have Exhibit 76, please?

Q. Mr. Hougham, there has been introduced into evidence Exhibit 76, which is the application of William Schwartz for priority for five weapon carriers, nine four-ton heavy duty trucks, and 15 low bed Freuhauf trailers 22 tons. I take it those were the Freuhauf trailers you have just referred to that Mr. Schwartz acquired under this surplus [298] application?

A. I presume they were, because they were on his original application.

Q. I direct your attention to question No. 5 on this application, which has "address of enterprise" and in that part the statement 525 Jones Street, San Francisco, California. I believe Mr. Schwartz testified that to the best of his recollection that address was given to him by you. Do you have any present knowledge of 525 Jones Street being discussed between yourself and Bill? A. I don't, sir.

Q. Did you have an employee on your staff at that time named Mr. Hogan? A. Yes.

Q. Do you remember whether or not Mr. Hogan discussed an address in San Francisco with you? If so, say yes; if not, say no.

A. I am under the impression that Mr. Hogan and I did discuss the San Francisco address.

Q. But whether it was Jones Street or not you don't know?

(Testimony of Edward B. Hougham.)

A. Whether it was Jones or Sansome Street, I can't tell you, I don't remember.

Q. I show you Defendants' Exhibit B, which is a photograph of a garage at 525 Jones Street, San Francisco, and ask you to examine that photograph and see if that rings [299] a bell with you in reference to whether or not 525 Jones Street was discussed?

A. Well, I've got two answers for you.

Q. Give them both. We want the truth and all of it.

A. It comes to my mind I have used this garage in years gone by to park repossessions in. That was in the '30s, '20s.

Q. All right.

A. But in connection with this venture, I don't know anything about it.

Q. Now, in the year 1946 you knew a group of dealers in San Francisco, did you not, automobile dealers?

A. Automobile dealers, truck dealers, and salvage dealers, I still know probably 75 men in the business in the Bay Area, in San Francisco.

Q. Getting back here to Exhibit 76, Mr. Hougham, were you present in San Francisco when Mr. Schwartze made that application?

A. No, sir.

Q. Did you counsel or advise with him in respect to what he should put upon that or any other application for a priority?

A. No, sir.

(Testimony of Edward B. Hougham.)

Q. Did you have any knowledge of the contents of this application until this lawsuit was filed? [300]

A. I did not.

Q. Now, in connection with Mr. Schwartz's contemplated truck rental business, did you have any arrangement to participate in any of the profits of that contemplated enterprise? A. Profits?

Q. Yes. A. Were all his.

Q. What became of the trucking equipment after you found it was unworkable?

A. Went into Baker's Motor Market stock and was sold.

Q. And was sold. Now, in addition to purchasing trucking equipment for the truck rental business, did Mr. Schwartz qualify as a veteran dealer, if you know? A. Yes.

Q. He secured a California wholesale and retail automobile dealer's license? A. Yes.

Q. And a retail sales tax permit—

A. Yes.

Q. —from the Board of Equalization?

A. Yes.

Q. Now, Mr. Schwartz stayed with you in Baker's Motor Market for how long?

A. He remained in the store until some time in 1947. [301]

Q. Then what did he do?

A. I made him a present of a 25 per cent interest in a farming operation known as Erstad Company.

Q. The Erstad Company?

(Testimony of Edward B. Hougham.)

A. Yes. In other words, you set him up in the farming business, and he is still in it now?

A. That is right.

Q. Now, do you know Mr. Owen Dailey?

A. Yes, sir.

Q. When did you first meet him?

A. When he was a representative of the Firestone Tire and Rubber Company in Bakersfield, California.

Q. During what period of time was that?

A. I think it was about 1939 that he came into the Bakersfield territory. I am not positive, however.

Q. Now, did Mr. Owen Dailey enter the military service in World War II?

A. Yes, sir.

Q. Do you recall contacting or writing or calling or seeing Mr. Owen Dailey before he left the service, before he was separated?

A. Yes, I wrote to him six months before he left the service.

Q. Now, he got out of the service in, I believe he said in June of 1946, that would place this so-called letter around [302] the first of the year, 1946, is that right?

A. Yes.

Q. And what was that communication in connection with?

A. I wanted to be sure that he was coming to Baker's Motor Market to go to work for me.

Q. Now, at that time, that was before the so-called veteran dealer priorities had been established by government regulations, is that true?

A. Yes.

(Testimony of Edward B. Hougham.)

Q. Now, Mr. Dailey did enter your employ when he returned from the service, is that right?

A. Yes.

Q. And what were his duties?

A. He was to take my place as the actual general manager, he was to put a parts department together and see it was expedited, and he was to expedite the whole business from sales to maintenance and manufacturing.

Q. Now, did Mr. Dailey secure a dealer's license from the State of California, and a dealer sales tax permit from the State Board of Equalization?

A. Yes.

Q. And that was done with your knowledge?

A. Yes.

Q. And consent? A. Yes. [303]

Q. And did he also make an application to the War Assets Administration, or the Veterans Department, for a veteran dealer priority certificate?

A. Yes.

Mr. Conron: Mr. Clerk, could I have Exhibit No. 1?

Q. I am showing you, Mr. Hougham, Plaintiff's Exhibit No. 1, which purports to be the application for a dealer's priority certificate executed by Mr. Owen Dailey. Were you present when Mr. Dailey filled out that application? A. No.

Q. Did you counsel or advise him in any way with respect to the contents of that application?

A. No, sir.

Q. Did you have any knowledge of the contents of that application until this lawsuit was filed?

(Testimony of Edward B. Hougham.)

A. No.

Q. In respect to any statement, true or false, that it may contain, you gave him no suggestion in reference to what to put on this paper?

A. That is correct.

Q. Now, Mr. Dailey did purchase articles under this veteran's preference certificate, you know that?

A. Yes.

Q. You advanced him the money to do that?

A. Yes, I did. [304]

Q. Money you advanced to him you considered loans by you to him?

A. That is correct.

Mr. Conron: Could I have Exhibits 94 and 97, please, Mr. Clerk?

Q. Were Mr. Dailey's duties as your employee separate and apart from his activities as a veteran dealer?

A. Yes.

Q. In purchasing these articles from Mr. Dailey, did you have any knowledge there was any irregularity in the method of the transaction?

A. None whatever.

Q. In advancing the money to Mr. Dailey, did you have any knowledge of any alleged irregularity in making such advances?

A. I had none.

Q. Now, you know Mr. Harlan McFarland?

A. Yes.

Q. When did you first become acquainted with him?

The Court: I think this morning, didn't he say he was in knee pants?

The Witness: That is correct.

(Testimony of Edward B. Hougham.)

Mr. Conron: I am following an outline here that I prepared before the morning examination, and I beg the Court's pardon. I will try to skip it if I can recall. [305]

Q. To your knowledge he conducted a used car lot in Bakersfield since approximately 1933?

A. That is correct.

Q. Located on East 19th Street?

A. That is correct.

Q. I show you Defendants' Exhibit A, containing a group of six photographs. Do you recognize those photographs as being his used car lot?

A: That is McFarland Motor Company.

Q. Do you recognize any of your equipment that is on that lot, that you consigned to him?

A. It is all mine.

Q. Now, you know Mr. McFarland entered the military service in World War II and was honorably discharged? A. Yes.

Q. In the year 1945? A. Yes.

Q. And before the matter of veteran dealer's priority came into being under the government regulations and orders?

A. May I have the question again?

(Question read.)

A. That is correct.

Q. And you and McFarland entered into a business arrangement whereby you consigned merchandise to his lot for resale by him to the general public? [306] A. That is correct.

Q. Merchandise put on his lot you had a price

(Testimony of Edward B. Hougham.)

per vehicle to you, and he sold at a profit over that price? A. That is right.

Q. Did you participate in any way in the spread between your figure and his ultimate sales price?

A. No.

Q. Did you have any connection with paying the rent, or owning the land upon which McFarland Motors is located? A. No, sir.

Q. Or the lights or gas bill? A. No.

Q. Or his employees' salaries, if any?

A. No, sir.

Q. Now, it did come to your attention that Mr. McFarland made an application to the War Assets Administration, or the Veterans Department, for a veteran's priority certificate? A. Yes.

Q. And did it come to your attention that he purchased articles by the use of that certificate from the War Assets Administration during the year 1946? A. May I have the question again?

(Question read.)

A. That is correct.

Q. You advanced or loaned him the money for that purpose? [307] A. I did.

Q. And you purchased from Mr. Dailey the articles that he so acquired, did you not?

A. Are we talking about Mr. McFarland?

Q. Yes, McFarland, pardon me. A. I did.

Q. And the price you paid to him netted him a \$10 profit per item? A. That is correct.

Q. And that \$10 spread between his cost and your purchase price, did you participate in any way in that benefit? A. No, sir.

(Testimony of Edward B. Hougham.)

Q. Mr. Hougham, here is Plaintiff's Exhibit 97, which purports to be Mr. McFarland's application for a veteran's priority. Were you present when Mr. McFarland filled that out? A. No, sir.

Q. Did you counsel or advise him in any way with reference to any statement contained in that document? A. No.

Q. Did you have any knowledge of the contents of the document until after this lawsuit was filed?

A. None whatever.

Q. I am now going to show you Plaintiff's Exhibit 94, which purports to be a second application for veteran's priority, signed by Mr. Harlan McFarland. The first one [308] appears to have been applied for on March 20, 1946, and the second on July 2, 1946. Were you with Mr. McFarland when he filled out that application? A. No.

Q. Did you counsel or advise or suggest to him anything to be placed in that application?

A. No.

Q. Did you have any knowledge of the contents of that application until after this lawsuit was filed?

A. None whatever.

Q. Did you have any knowledge of any irregularity, if any, in either of the applications made by him? A. No.

Q. Did you ever knowingly engage in or cause to be used, or engage in any fraudulent trick, scheme or device for the purpose of securing or obtaining government property from the United States?

(Testimony of Edward B. Hougham.)

A. Just a little slower, may I have it again, please?

(Question read.)

A. No.

Q. Or from the War Assets Administration?

A. No.

Q. Did you during 1946 agree to engage, combine or conspire with Schwartz, McFarland or Dailey, or any of them, to use fraudulent tricks and devices for the purpose of [309] securing or obtaining government property? A. No.

Q. Did you conspire with Owen Dailey to use Dailey's veteran's priority certificate to obtain war surplus property? A. No.

Q. Did you ever use Dailey's veteran's certificate in any way?

A. You mean, did I personally?

Q. Personally? A. No, sir.

Q. And how about Schwartz's preference certificate? A. The answer would be the same.

Q. And McFarland's?

A. The answer would be the same.

Q. Now, with reference to these articles that are set forth in the complaint, did you specifically instruct Schwartz to purchase the identical articles set forth in the complaint as having been purchased by him? A. No.

Q. Did you specifically instruct Owen Dailey to purchase the identical articles set forth in the complaint, alleged to have been purchased by him?

(Testimony of Edward B. Hougham.)

A. No.

Q. And did you specifically select and instruct McFarland to purchase the identical articles set forth in the [310] complaint? A. No.

Q. These men all had a general knowledge of your inventory and your requirements?

A. That is correct.

Q. Now, Mr. Hougham, let's talk about your business volume percentagewise for a minute. We have here in the courtroom your control records for the business done by you in the years 1944, '45 and

'46. A. Yes.

Q. Without taking them out, unless counsel would like to further examine them—he has had the opportunity or his predecessor has—you have made summaries from those records? A. Yes.

Q. Can you refer to your notes, in which you summarize your records, and tell us the volume of the business you did in '44, '45, and '46, gross business?

A. In '44, wholesale and retail, by myself and skeleton crew I did \$223,999 worth of business.

Q. That was before these veterans came onto your staff? A. That is correct.

Q. All right, '45?

A. In 1945, Mr. McFarland and Mr. Schwartze were there five or six months; we did \$296,206 worth of business.

Q. In 1946? [311]

A. In 1946, with Mr. McFarland, Mr. Schwartze and Mr. Dailey, we did \$486,730 worth of business.

(Testimony of Edward B. Hougham.)

Q. Now, what about your net profit from your business in 1944?

A. In 1944, my profit from my automotive business—

Q. Yes. A. —was \$37,282.

Q. What about your profit in 1946, when the boys were with you?

A. In 1946, the profit was \$34,921.

Q. Now, let's look at the business in 1946 from another angle. You spoke of gross sales of four hundred off thousand, did you not?

A. \$486,000.

Q. Now, do you have a figure of gross purchases?

A. I don't have a figure of gross purchases, otly in this manner—

Q. All right.

A. —Dailey and Schwartz and McFarland purchased \$79,512 worth of merchandise.

Q. And the balance of the merchandise that went into that gross figure, you purchased yourself?

A. \$407,000.

Q. Or acquired from sources other than these three.

A. I purchased them, purchased it personally. [312]

Q. And I take it that percentagewise that would mean that they contributed approximately 20 per cent to the gross volume of business during the year 1946?

A. That is right, around that.

The Court: We will take our afternoon recess.

(Short recess.)

(Testimony of Edward B. Hougham.)

Mr. Conron: Your Honor, I have concluded my examination of Mr. Hougham.

The Court: Mr. Lavine?

Redirect Examination

By Mr. Lavine:

Q. Mr. Hougham, in the course of my introduction of various exhibits for the second cause of action, involving yourself and Mr. Schwartz, for what we have called in our second amended complaint transaction No. 4, we have set forth and introduced exhibits concerning five 1945 Freuhauf low bed trailers. The purchase price for each of these is set forth on page 10 of the second amended complaint as \$2,220.87. You have testified, as has Mr. Schwartz, concerning the fact that certain Freuhauf trailers were too wide for California requirements. Do you mean in 1945 Freuhauf low bed trailers I have just mentioned, the ones we speak of, were too wide for California highways?

A. Freuhauf trailers purchased by Mr. Schwartz that I am talking about, I believe were the first and only 22-ton [313] Freuhauf trailers Mr. Schwartz purchased.

Q. Now, also on page 10 of the second amended complaint, and in the series of exhibits, we presented evidence concerning the purchase by Mr. Schwartz of some eight Freuhauf military four-ton trailers, for the unit price in each of those of \$583.30. Were these four-ton military Freuhauf trailers too wide for the California highway?

(Testimony of Edward B. Hougham.)

A. Entirely different trailer.

Q. These are not the ones you meant by being too wide? A. No.

Mr. Lavine: I have no further questions.

The Court: Well, is it my understanding that the trailers listed in item 2, page 10, are the ones that were too wide for use on California highways?

Mr. Lavine: Your Honor referred to item 2. I was referring to what I denominated item 4.

The Court: Item 4, yes. Are those the ones that were found to be too wide for California use?

Mr. Lavine: That is what I understand from the testimony, your Honor.

The Witness: They should be designated, if they have a description on them, as 22-ton.

The Court: Well, they are designated here as 1945 Freuhauf low bed trailers. We might find out, that is starting with Exhibit 88. [314]

Mr. Lavine: All of them are contained in Exhibit 88, your Honor. Looking now at No. 4, yes, they are described in these sales documents as army trailers, Freuhauf, 1945, low bed, drive 4 by 2, 22-ton trailers. Are those the ones we are speaking of as being too wide?

The Witness: That is correct, and there were five of them.

The Court: Well, there seem to be five listed by serial numbers here.

Mr. Lavine: Yes, your Honor I have no more questions.

Mr. Conron: That is all. I would like to recall Mr. McFarland for one question, if I may.

(Witness excused.)

The Court: Yes.

**HARLAN L. McFARLAND**

one of the defendants, resumed the stand as a witness for defendants, and having been previously duly sworn, was examined and testified as follows:

**Direct Examination**

By Mr. Conron:

Q. Mr. McFarland, I show you Plaintiff's Exhibit 5, which is a veteran's preference certificate. I believe his Honor asked some questions on this subject this morning and I want to clear it up. Now, without regard to the contents of this particular certificate, I am asking you [315] now a point of procedure that was followed insofar as you experienced it. I show you also Exhibit 97, being one of the applications for surplus property that you made for veteran's certificate. Now, as a result of signing and filing this with the Veterans Department—

The Court: You are referring now to 97?

Mr. Conron: 97, your Honor.

Q. —was it not a fact that the Veterans Department would then issue you pink certificates covering the articles that you had applied for—

A. Yes, sir.

Q. —in this application?

A. Yes.

(Testimony of Harlan L. McFarland.)

Q. And you would use this pink certificate, such as Plaintiff's Exhibit No. 5, in going to the War Assets Administration disposal yards, as your authority to purchase there? A. Yes.

Q. And in each case, you were issued certificates containing specified items comparable to the items on the application that you filed with the Veterans Department? A. That is right.

Q. Now, this Plaintiff's Exhibit No. 5, Mr. McFarland, is pink, if I am not color blind.

A. Yes. [316].

Q. Did they issue certificates of a different color?

A. Yes, they did.

Q. And was there any significance as to the color? A. Yes, there was a blue certificate.

Q. Now, what type of certificate is the blue certificate?

A. That is a veteran's personal use certificate.

Q. And it would be one that the veteran would sign a statement that the article was not purchased for resale? A. That is right.

Q. What is the significance of the pink certificate?

A. That is a veteran dealer's certificate, marked appropriately as a dealer.

Q. And you would acquire these as a result of your statement in your application to the effect that you intended to resell or deal in the article, and not use it personally? A. That is correct.

Mr. Conron: I think that is all. Thank you.

Mr. Lavine: I have no questions.

Mr. Conron: That is all.

(Witness excused.)

Mr. Conron: Mr. Lavine, perhaps you may help me in locating an exhibit that you offered. It is a miscellaneous group of documents pertaining, I, think, to Schwartze.

Mr. Lavine: Probably should be Exhibit 77, I believe.

Mr. Conron: May I look at that, please? [317]

I don't know whether I interpret this correctly or not.

(Conference between counsel.)

Mr. Conron: Mr. Clerk, would you mark these? If we can, I will offer these for identification as Defendants' Exhibit D.

Mr. Lavine: Mr. Conron, is this a new exhibit, or is this an exhibit that was taken out of the file?

Mr. Conron: A new exhibit. File 77 has a copy of it.

Mr. Lavine: Yes, correct.

Mr. Conron: Your Honor, I offer<sup>2</sup> into evidence as Defendants' Exhibit D, without foundation, by stipulation, these three documents that have been supplied me by Mr. Lavine, as coming from the government files. The first is a communication addressed to Owen N. Dailey, bearing date November 6, 1946. Without reading it in detail, I will generally state the substance of it. War Assets Administration have adopted a new policy in reference to veteran's priority certificates. Your present certificates are invalid. You should fill in the new application

which contains the following detailed data not previously requested:

"A letter on the stationery and over the signature of a representative of one of the following:

"a. Local Trade Association.

"b. Chamber of Commerce.

"c. Your Bank." [318]

This letter must contain a statement to the effect that the writer has evidence that you are or will be engaged in business requiring the property sought.

2. A photostatic or certified copy of lease or rental agreement, or other evidence of your control—your control—of the office or warehouse storage space.

3. Certified or photostatic copy of licenses required by law to operate your business.

4. A statement over your signature outlining the financial responsibility of the individuals composing the enterprise in question.

As I say, this letter is addressed to Owen Dailey and it bears date November 6, 1946.

The second of the group of three letters is a photostat supplied me by the United States Attorney, of a letter identical in language, addressed to William Schwartz. This letter, however, is undated.

The third is a letter identical in language, addressed to Harlan L. McFarland. This letter is also undated.

The letter addressed to Schwartz, apparently the original was offered by Mr. Lavine in a group of miscellaneous document offered into evidence as Plaintiff's Exhibit 77.

I have no way of indicating to your Honor the date that the Schwartz and McFarland communications were sent, but I assume since the Dailey letter was dated November 6th that [319] the others were at least in that immediate vicinity, because they deal with the identical subjects.

The Court: Well, I should assume if new regulations were in effect, that letters probably were sent to all of the veterans having a priority certificate about the same time.

Mr. Lavine: I would so assume.

Mr. Conron: We only have direct evidence as to the date on the one.

The Court: Yes. Well, I would assume the others were about the same time.

Mr. Conron: I have searched as far as I could to verify the date on the others, and have been unable to.

Mr. Lavine: The plaintiff rests, your Honor.

(The documents referred to were marked as Defendants' Exhibit D, and were received in evidence.)

---

#### DEFENDANTS' EXHIBIT D

WAA-SF-321

War Assets Administration  
1540 Market Street  
San Francisco 2, California

November 6, 1946

Case Number: V-10-A-55767

Defendants' Exhibit D—(Continued)

Name: Owen N. Dailey,  
Address: 2328 Chester Ave.,  
City: Bakersfield, Calif.

Dear Sir:

Under a new policy decision from the Administrator of War Assets Administration, Veteran brokers are no longer eligible to exercise priority right in the purchase of surplus property. This program necessitates rescreening all Veteran Applications for purchase of surplus goods that are in our files. Accordingly, this is to notify you that all Veteran Preference Certification Slips now in your possession are invalid and will not be honored at any sale conducted by WAA until you have completed one of the two procedures indicated below.

Procedure No. 1. If you are not certified on a Resale Application and do not intend to use the property you are certified for in a resale operation, kindly write "Not for Resale" across the face of this letter, complete the attached application in duplicate and return to the Field Certification Office indicated in the last paragraph of this letter.

Procedure No. 2. If you are certified on a Resale Application and intend to use the property you are certified for in a resale operation, complete the attached application and "Resale Certificate" in duplicate and furnish the additional information indicated below to be retained as part of this application:

## Defendants' Exhibit D—(Continued)

1. A letter on the stationery and over the signature of a representative of one of the following:

- a. Local Trade Association
- b. Chamber of Commerce
- c. Your Bank

The above letter must include a statement to the effect that the writer has evidence that you are, or will be engaged in business requiring the property sought.

2. A certified or photostatic copy of lease or rental agreement, or other evidence of your control of office and warehouse or storage space sufficient to house the property desired.

3. A certified or photostatic copy of licenses required by law to operate your business.

4. A statement over your signature outlining the financial responsibility of the individuals composing the enterprise in question to purchase the surplus property requested.

Your application will be rescreened and if found valid you will be immediately recertified and new Certification Slips, bearing your original date of application and case number, will be issued to you.

For your convenience your original application and file folder have been forwarded to the WAA Field Certification Office at 234 North El Dorado St., Fresno, Calif. In complying with the Procedure that applies to you, it is requested that you submit the

Defendants' Exhibit D—(Continued) /

information requested therein, along with your old invalid Preference Certificates (Form 63) now in your possession to that office.

This program will enable us to better service your needs and we will appreciate your cooperation.

Very truly yours,

A. G. HOLLIS,

Director, Veterans Division,

By /s/ F. A. CHAMBERS,  
ECM.

WAA-SF-321

War Assets Administration

1540 Market Street

San Francisco 2, California

Case Number: 10 A 24067

Name: William E. Schwartwartz

Address: 2328 Chester Ave

City: Bakersfield, California.

Dear Sir:

Under a new policy decision from the Administrator of War Assets Administration, Veteran brokers are no longer eligible to exercise priority right in the purchase of surplus property. This program necessitates rescreening all Veteran Applications for

## Defendants' Exhibit D—(Continued)

purchase of surplus goods that are in our files. Accordingly, this is to notify you that all Veteran Preference Certification Slips now in your possession are invalid and will not be honored at any sale conducted by WAA until you have completed one of the two procedures indicated below.

Procedure No. 1. If you are not certified on a Resale Application and do not intend to use the property you are certified for in a resale operation, kindly write "Not for Resale" across the face of this letter, complete the attached application in duplicate and return to the Field Certification Office indicated in the last paragraph of this letter.

Procedure No. 2. If you are certified on a Resale Application and intend to use the property you are certified for in a resale operation, complete the attached application and "Resale Certificate" in duplicate and furnish the additional information indicated below to be retained as part of this application:

1. A letter on the stationery and over the signature of a representative of one of the following:

- a. Local Trade Association
- b. Chamber of Commerce
- c. Your Bank

The above letter must include a statement to the effect that the writer has evidence that you are, or will be engaged in business requiring the property sought.

Defendants' Exhibit D—(Continued)

2. A certified or photostatic copy of lease or rental agreement, or other evidence of your control of office and warehouse or storage space sufficient to house the property desired.

3. A certified or photostatic copy of licenses required by law to operate your business.

4. A statement over your signature outlining the financial responsibility of the individuals composing the enterprise in question to purchase the surplus property requested.

Your application will be rescreened and if found valid you will be immediately recertified and new Certification Slips, bearing your original date of application and case number, will be issued to you.

For your convenience your original application and file folder have been forwarded to the WAA Field Certification Office at 2138 Merced Street, Bakersfield, California. In complying with the procedure that applies to you, it is requested that you submit the information requested therein, along with your old invalid Preference Certificates (Form 63) now in your possession to that office.

This program will enable us to better service your needs and we will appreciate your cooperation.

Very truly yours,

A. G. HOLLIS,

Director, Veterans Division.

*United States of America*  
Defendants' Exhibit D—(Continued)

WAA-SF-321

War Assets Administration  
1540 Market Street  
San Francisco 2, California

Case Number: 10 A 24063

Name: Harlan L. McFarland,  
Address: 1200 E. 19th Street,  
City: Bakersfield, California.

Dear Sir:

Under a new policy decision from the Administrator of War Assets Administration, Veteran brokers are no longer eligible to exercise priority right in the purchase of surplus property. This program necessitates rescreening all Veteran Applications for purchase of surplus goods that are in our files. Accordingly, this is to notify you that all Veteran Preference Certification Slips now in your possession are invalid and will not be honored at any sale conducted by WAA until you have completed one of the two procedures indicated below.

Procedure No. 1. If you are not certified on a Resale Application and do not intend to use the property you are certified for in a resale operation, kindly write "Not for Resale" across the face of this letter, complete the attached application in

**Defendants' Exhibit D—(Continued)**

duplicate and return to the Field Certification Office indicated in the last paragraph of this letter.

**Procedure No. 2:** If you are certified on a Resale Application and intend to use the property you are certified for in a resale operation, complete the attached application and "Resale Certificate" in duplicate and furnish the additional information indicated below to be retained as part of this application:

1. A letter on the stationery and over the signature of a representative of one of the following:

- a. Local Trade Association
- b. Chamber of Commerce
- c. Your Bank

The above letter must include a statement to the effect that the writer has evidence that you are, or will be engaged in business requiring the property sought.

2. A certified or photostatic copy of lease or rental agreement, or other evidence of your control of office and warehouse or storage space sufficient to house the property desired.

3. A certified or photostatic copy of licenses required by law to operate your business.

4. A statement over your signature outlining the financial responsibility of the individuals composing

## Defendants' Exhibit D—(Continued)

the enterprise in question to purchase the surplus property requested.

Your application will be rescreened and if found valid you will be immediately recertified and new Certification Slips, bearing your original date of application and case number, will be issued to you.

For your convenience your original application and file folder have been forwarded to the WAA Field Certification Office at 2138 Merced Street, Fresno, Calif. In complying with the Procedure that applies to you, it is requested that you submit the information requested therein, along with your old invalid Preference Certificates (Form 63) now in your possession to that office.

This program will enable us to better service your needs and we will appreciate your cooperation.

Very truly yours,

A. G. HOLLIS,

Director, Veterans Division.

[Endorsed]: Filed September 26, 1957.

Mr. Conron: I believe our case is all in too, your Honor. I followed along, haven't exactly cross-examined but while the witnesses were on the stand I brought out the matters I was interested in.

The defendants rest.

The Court: Mr. Conron, I will turn these three photostats over to you. I was wondering what arrangement we might make for oral argument on the matter.

Mr. Lavine: I am ready to proceed now, your Honor. I [320] imagine my argument total will not be more than an hour.

Mr. Conron: Wouldn't it perhaps be better, if Mr. Lavine is going to talk an hour, I know it will take me an hour to answer him—

The Court: I was just wondering if we should put this over until in the morning. I set aside the week for this trial, in the belief it was a jury trial, and we have moved along a little faster, and that will enable me to review my notes. Unless there is some objection, I think we will go over until tomorrow morning.

Mr. Conron: I personally prefer it.

The Court: Mr. Lavine, do you have any objection?

Mr. Lavine: None, your Honor; in any event we are going to get into tomorrow, no matter what procedure we adopt.

The Court: Then if it is agreeable to everybody, we will reconvene at 10:00 o'clock tomorrow morning.

(Thereupon, at 3:35 o'clock p.m., a recess was taken until 10:00 o'clock a.m., September 27, 1957, for oral argument.)

## Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Fresno, California, this 9th day of December, A.D. 1957.

/s/ HELEN G. SCHULKE,  
Official Reporter.

[Endorsed]: Filed December 14, 1957.

In the United States District Court  
Southern District of California  
Northern Division  
No. 1423- Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. H. HOUGHAN, individually and doing business  
as Bakers Motor Market; et al.,

Defendants.

Honorable Gilbert H. Jertbert, Judge Presiding.

**REPORTER'S PARTIAL TRANSCRIPT  
OF PROCEEDINGS**

Appearances of Counsel:

For the Plaintiff:

**LAUGHLIN E. WATERS,**

United States Attorney, by

**RICHARD LAVINE,**

Assistant United States Attorney.

For the Defendants:

**CONRON, HEARD & JAMES,**

By **CALVIN S. CONRON,** and

**WAYNE M. HAMILTON.**

Friday, September 30, 1957, 4:15 P.M.

(After presentation of evidence and argument by counsel.)

The Court: Well, is the matter submitted then?

Mr. Conron: Submitted.

Mr. Lavine: Submitted, your Honor.

The Court: Well, I have lived rather closely with this case over some little period of time. I have endeavored to read understandingly the various legal memoranda that have been filed by counsel, the various factual briefs that have been filed. I have listened attentively to the evidence in this case. I did review the proposed instructions that have been submitted shortly after they were submitted, and have reviewed some of them during the course of this trial. And I probably am about

as well prepared to render a decision at this time as if I should take the case under advisement.

The case has certainly been well presented, and I think that each side has squeezed out of each fact every drop of beneficial matter pertaining to his side of the case.

Now, as indicated, the case goes back a number of years, and we endeavor to reconstruct at this time what the situation was as of 1945, '44 and '46, the years in which we are particularly interested.

There is no question in my mind that if a veteran, for [2\*] instance, had acquired a vehicle for his own personal use, not for resale, and some real circumstance arose, I think he might dispose of that vehicle without incurring any civil or criminal penalty. An illustration might be a veteran who acquired a vehicle for his own use and shortly thereafter decided to take up residence, for instance, in some different area or some foreign country. Certainly my own view is that he could dispose of the vehicle without fear of penalty.

I think the same might be true of a veteran who intended in good faith at the time of his application to go into business, and if there was some overriding circumstance that frustrated his plans, he could go ahead and liquidate the business, even though it was contrary to the plan that he had first had in mind.

Now in the decision in this case, I think the burden is clearly upon the government to establish the essential elements by a preponderance of the

\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

evidence. I think in this type of case the law requires that the evidence be clear and convincing. I cannot share Mr. Conron's view that the evidence must establish the allegations beyond a reasonable doubt, even though there may be the possibility of the same act constituting a criminal offense.

Mr. Conron: I can't find any law to support it, your Honor.

The Court: I have handled a few fraud cases, and it seems to me the best the defendant can assert is the evidence [3] produced by the other side must be clear and convincing, which means something more, I suppose, than just the ordinary burden of proof; it is a little greater than the ordinary burden of proof in cases involving fraud.

Now, I think this is also true, that acts may be done out of good motives, that are perhaps laudable, and yet under certain circumstances might not be free from legal censure.

In viewing a situation of this kind, it seems to me that the Court has got to view it, after analyzing it, from the standpoint of the effect of the total evidence on the mind of the Court. I don't think you can pick out particular items of evidence, examine those items in a vacuum, so to speak, and say that that item of evidence has certain value one way or the other. I think you have got to view all of the testimony, giving proper weight to each item, or lack of weight, and reach one conclusion.

Of course, you attorneys have lived with this thing very closely over a long period of time, and at least in Mr. Conron's case had the benefit of

apparently close, if not association at least knowledge of his clients and their reputations in the community. Mr. Lavine, on the other hand, of course, having worked for the government a number of years, perhaps is more impressed with regulations, certificates, than counsel not in the government.

We have this situation: in 1945 Mr. Hougham was an [4] established dealer in war surplus materials. He had had long and extensive experience in the purchase and sale of used automobiles, trucks and what not, and when the war prevented the acquisition of pleasure cars, and what not, my recollection is the testimony was at this time he was exclusively in the war surplus business.

Now, the three young men come back from the service, and like all returning veterans, of course, they are anxious to get a foothold, to reestablish themselves, all laudable, in civilian life. Two of them, at least, had had some experience in the used car business. Mr. Hougham's son apparently had rather limited experience except in doing the work a school boy probably does after school and Saturdays and Sundays.

Now, the testimony, I think, reveals that Mr. Hougham and these veterans, either separately or collectively, discussed what these men might do to rehabilitate themselves, and I suppose that the meeting was by mutual arrangement. I do not think that Mr. Hougham called these men in and said, "Here, I want you to go back in the used car business on your own account." I think that the veterans were interested in getting reestablished, and

Mr. Hougham was perfectly willing apparently to assist them. But as I say, the effect of the testimony on me is that there were discussions about what might be done to get these veterans into business. [5]

Now, the applications made by the various veterans, I think, must be considered somewhat in the light of that background. For instance, it may be unimportant the two addresses that appeared on the applications if viewed solely from the questions asked on that application. When you attempt to view the overall picture those things may have more or less significance.

I think Mr. Schwartz — and I realize, of course, this goes back ten years — was under the impression that his father told him to use the Jones Street address. Now this is rather singular, that many years before that Mr. Hougham had used that same address as a place apparently to store repossessed cars. So I am inclined to feel, looking at all of the evidence, that that address was suggested by Mr. Hougham. Now, exactly why I don't know.

Taking the case of Mr. McFarland, the Oakland address appears. Time apparently has dulled Mr. McFarland's mind as to the reason for that.

Now, as I say, viewed separately and in isolation, it may be of no significance, but as part of the whole picture that has been revealed the last three or four days in court, that again may have more or less significance.

Now, it also strikes me that the testimony is clear that before each of these veterans listed what

property he desired to buy he consulted Mr. Hougham as to what type of vehicles [6] Mr. Hougham felt might be saleable in a used car lot. In other words, it wasn't a question of the veteran himself picking out the vehicles that he wanted and then going to Mr. Hougham and saying, "I have some vehicles here for sale, do you care to buy them?" In other words, I feel from the evidence that the veterans conferred with Mr. Hougham and at least, except perhaps in the instance of Mr. Schwartz, expressed the desire to buy only the vehicles that Mr. Hougham stated or felt were resalable on his lot.

Now, the financial arrangements were unorthodox, certainly not in accordance with the usual practices of existing businesses. I think that in the case of the son that might be easily understood. Any father is always willing to help his son, and I think that feeling would be accentuated in the case of a son returning from service and wanting to get re-established. But there were no loan papers of any kind that were executed. I think one usual manner would have been to have established a line of credit, say, at a bank, with a guarantee of Mr. Hougham. Of course, that was not done in this case. It seemed to be simply the arrangement that when these men would go to these sales they went to Mr. Hougham and having knowledge in advance of the total cost would get the currency from him or he would send them with a note over to the bank and they would get the currency. As I say, there were no loan

papers and no security papers [7] of any kind, and apparently an agreement, which I assume was made prior to the signing of these applications, at least with respect to McFarland and Dailey, that if they were able to secure the vehicles that Mr. Hougham felt could be resold, reconditioned, why, they would get \$10 for each such transaction. There was no interest involved. There was no risk of the veteran as to the salability of these articles.

So my view of the total evidence from the case, without attempting to indicate to what extent each specific item of evidence affected my judgment, was that, speaking from the standpoint of Mr. Hougham, you go to these men and say "You make application for vehicles that I feel I will be able to resell and I will give you \$10, and pay your expenses in connection with the trip," it strikes me from all of the evidence that as far as any enterprise of these three men it was purely synthetic.

Now, if one views it in that light, then the matter of loans, bills of sale, pretty well vanish. I don't feel from the evidence that these were loans in that sense at all. I think these men were largely messenger boys in acquiring the surplus vehicles that Mr. Hougham felt he could use in his business.

As I say, when viewed in that light, the testimony has impressed me, and I don't feel that these were loans in the true sense in which we usually use those terms. [8]

Now, I don't say at all that there was anything sinister, or evil, in the arrangement that had been made. I think that Mr. Hougham was anxious to

give some help to these veterans. I don't feel that he had figured out in his own mind in detail that "I will work it this way and in that way get around the law". I don't know how familiar he was with the regulations, but of course lack of knowledge of the regulations under the law is not a defense in the action.

I am assuming that all of the merchandise in the second amended complaint was merchandise secured by these veterans at veterans' priority sales, and that all of the merchandise reached the lot of Mr. Hougham, and were reconditioned, and were disposed of by him either directly or after reconditioning through Mr. McFarland.

Now, one of the difficult things in this case has been the judgment which should be entered in this case. The original complaint asked for \$2,000 for each act plus double the consideration paid. The first amended complaint that was proposed asked for a sum equal to twice the consideration agreed to be paid. The second amended complaint asks for \$2,000 for each act.

I think there is no evidence in the case showing actual damage to the United States. There is perhaps another provision in the law regarding that; I have forgotten. But one of the difficult questions is to determine what [9] constitutes the type of act that is embodied in the Code. In 40 U.S.C.A. 489, it says:

"Every person who shall use or engage in, or cause to be used or engaged in, or enter into any agreement, combination, or conspiracy to use or en-

gage in, or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of obtaining or aiding to secure or obtain, for any person upon payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property under this chapter, \* \* \* shall pay to the United States the sum of \$2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with cost of suit, or shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration \* \* \* or, shall, if the United States shall so elect, restore to the United States the money or property thus secured."

I have read, I think, all of the cases that have been cited under the False Claims Act, and there is certainly a conflict of view in them. Now, in this case, it is my understanding that the law contemplated that in making his [10] application the veteran would list the property that he desired to acquire, that if that particular item wasn't available maybe there would be a substitution, and eventually in one way or the other his application, to the extent feasible or possible, would be filled.

Now, I have come to the conclusion in this case that the acts were the acts in connection with these applications.

I gave some thought or consideration to maybe the transactions occurring on separate days might be a separate act, but it seems to me the genesis of the whole matter are these applications, so there were

three separate applications filed by each veteran, and then one veteran filed an additional application.

I think that the recovery by the government should be limited to the four acts, of the statutory amount, and it is my view that Mr. Hougham, I have already indicated, participated in those various acts.

So the Court will order judgment in accordance with the views here expressed, and direct the government to prepare findings, conclusions, consistent with the remarks that I have made.

Mr. Lavine: Your Honor, in brief, is it my understanding that judgment is in a total of \$8,000, for the four parties, consistent with the various causes of action; in other words, a sum total of \$8,000? Is that your Honor's ruling? [11]

The Court: I have forgotten—I can't find the second amended complaint—how the various causes of action have been set forth.

Mr. Lavine: In brief, your Honor, let us take the first cause of action, we charge Mr. Hougham and Mr. Dailey with being responsible, for the first cause of action, \$2,000 jointly?

The Court: Yes, down through the various counts, and, as I say, with respect to the one veteran where there were two applications there were in effect two acts, in accordance with my view of it.

Mr. Lavine: May we have ten days, rather than the usual five days, to prepare findings and judgment?

Mr. Conron: That is satisfactory.

I take it, Mr. Lavine, that judgment will be entered against Hougham and Schwartze jointly in

the sum of \$2,000; against Hougham and Owen Dailey in the sum of \$2,000; against Hougham and McFarland jointly in the amount of \$4,000.

Mr. Lavine: That is my understanding of the Court ruling.

The Court: I think that is right.

If there is nothing further, we will adjourn. The Court wants to again compliment counsel for their industry and research and their patience, and I appreciate all of the help that counsel on both sides have given in connection with this rather unusual, and in many ways very difficult case.

Mr. Conron: Thank you, your Honor.

[Endorsed]: Filed December 14, 1957. [12]

[Title of District Court and Cause.]

**CERTIFICATE BY THE CLERK**

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 131, inclusive, containing the original:

Complaint, filed December 31, 1954.

Answer to Plaintiff's Complaint.

Motion and Notice of Motion to File First Amended Complaint.

(Certified Copy) Memorandum and Orders on Defendants' Motion to Dismiss and for Sum-

mary Judgment, and Order on Plaintiff's Motion to File a Second Amended Complaint.

Second Amended Complaint, filed 1/31/57.

Answer to Second Amended Complaint.

Pre-Trial Conference Order.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal (Plaintiff).

Notice of Appeal (Defendants).

Designation of Contents of Record on Appeal (Defendants).

Counter-Designation of Contents of Record on Appeal (Plaintiff).

Stipulation and Order Extending Time for Docketing and Filing Record on Appeal.

B. Plaintiff's Exhibits Nos. 1 to 150, inclusive.

Defendant's Exhibits A to D, inclusive.

C. Two volumes of Reporter's Official Transcript of Proceedings had on:

September 27, 1957.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60 has not been paid by appellant.

Dated: February 3, 1958.

[Seal]. JOHN A. CHILDRESS,  
Clerk,

By /s/ WM. A. WHITE,  
Deputy Clerk.

[Endorsed]: No. 15873. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. E. B. Hougham, Owen Dailey, William E. Schwartz and Harlan L. McFarland, Appellees. E. B. Hougham, Owen Dailey, William E. Schwartz and Harlan L. McFarland, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Northern Division.

Filed: February 5, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 15873

UNITED STATES OF AMERICA,

Appellant,

vs.

E. B. HOUGHAM, etc., et al.,

Appellants-Appellees.

STATEMENT OF POINTS ON APPEAL.

The points on which Appellants E. B. Hougham, Owen Dailey, William E. Schwartz and Harlan L. McFarland intend to rely in this Court on this appeal are as follows:

1. The causes of action stated in the original Complaint are and each of them is barred by the Statute of Limitations.
2. The causes of action stated in the Second Amended Complaint are and each of them is different in substance and nature from the causes of action set forth in the original Complaint, and should have been stricken, but in any event they also are barred by the Statute of Limitations.
3. The insufficiency of the evidence to support the finding of fraud.
4. The Judgment is not supported by the Findings of Fact and Conclusions of law.

Dated: February 10, 1958.

CONRON, HEARD & JAMES,

By /s/ CALVIN H. CONRON, JR.,

Attorneys for Defendants and Appellants E. B.  
Hougham, Owen Dailey, William E. Schwartz  
and Harlan L. McFarland.

[Endorsed]: Filed February 13, 1958.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH  
CROSS-APPELLANT INTENDS TO RELY

1. The District Court erred in holding that the United States irrevocably elected its choice of statutory remedies for fraud by filing its original complaint.

2. The District Court erred in refusing to allow the Government to amend the prayer for damages in its original complaint.

Dated: March 7, 1958.

LAUGHLIN E. WATERS,

United States Attorney,

RICHARD A. LAVINE,

Assistant U. S. Attorney

Chief of Civil Division,

/s/ RICHARD A. LAVINE,

Assistant U. S. Attorney, At-

torneys for Cross-Appellant.

[Endorsed]: Filed March 10, 1958.

452 Minute entry of arguments and submission—October 3, 1958 (omitted in printing).

453 IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Minute entry of order directing filing of opinion and filing and recording of judgment—April 14, 1959 (omitted in printing).

454 IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

No. 15,873

UNITED STATES OF AMERICA, APPELLANT

vs.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND  
HARLAN L. MCFARLAND, APPELLEES

---

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND  
HARLAN L. MCFARLAND, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the United States District Court for the  
Southern District of California, Northern Division

---

OPINION—APRIL 14, 1959

Before: FEE, BARNES and HAMLIN, Circuit Judges

JAMES ALGER FEE, Circuit Judge:

This action was instituted to recover damages on account of the fraudulent acquisition of surplus property in violation of the provisions of the Surplus Property Act of 1944.<sup>1</sup> It was claimed that defendant E. B. Hougham, individually and

---

<sup>1</sup> 58 Stat. 760, 60 U.S.C.A. (1946 Ed.) §§ 1611-16.

under the assumed business name of Baker's Motor Market, had Owen Dailey, William E. Schwartz and Harlan L. McFarland, the other defendants, purchase for him surplus property vehicles from the government. These purchases were charged to have been accomplished by the use of priority certificates of veterans which belonged to the other defendants, respectively. It was claimed that Hougham could not otherwise have obtained title to such vehicles.

455 The record showed that each of the defendant veterans filed with the War Assets Administration an application for a certificate to enable him to purchase war surplus material on a priority basis. Upon the representations in the applications filed by these veterans, priority certificates were issued to each respectively. In each application presented by a defendant veteran, there was a representation reading as follows:

"I am, or will be, directly or indirectly, the sole proprietor of the enterprise described herein, or, that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof; \* \* \* that said property is to be used in and as part of the enterprise described herein."

The evidence also proved that Hougham had a large establishment and that defendant veterans were financed by him to purchase the property on the priority certificates; the vehicles were delivered to Hougham, who treated them as his own; the veterans received \$10.00 from Hougham.

The cause was tried by the court without a jury. A judgment was entered against Hougham and Dailey for \$2,000.00, against Hougham and Schwartz for \$2,000.00, and against Hougham and McFarland for \$4,000.00. These sums were described as "liquidated damages." The court ruled that the government had presented no proof of actual damage.

A major point raised is whether the action is barred by the Statute of Limitations. The court ruled that no statutory provision was applicable to bar the action.

It was claimed that the bringing of the action was limited by 28 U.S.C.A. § 2462, which reads:

"Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

456 The trial court ruled that the section above quoted did not apply and that, since the Surplus Property Act of 1944 contained no provision for limitation, the action therein authorized could be commenced at any time. It is significant in this connection that the trial court gave judgment for \$2,000.00 for each act.

The exact point has been ruled upon by the Court of Appeals for the Third Circuit in the case of *United States vs. Doman*, 255 F. 2d 865, 867, where it is said:

"The narrow issue, therefore, is whether Section 26 (b)(1) of the Surplus Property Act, which requires a person committing the prohibited act to pay the United States the sum of two thousand dollars for each fraudulent act in addition to double the amount of any damages which the United States may have sustained by reason of Koller's and Silberbrook's activities provides a civil fine, a penalty, or a forfeiture, or merely compensatory damages."

That court, citing the opinion of Judge Jertberg in the instant case, pointed out that the Supreme Court of the United States, in *Rex Trailer Co. vs. United States*, 350 U.S. 148, had held that the provisions of Section 26(b)(1) are civil and not criminal, although the point of limitation upon an action was not involved, but concluded the later opinion resolved the conflict among the circuits as to the existence of a bar. This Court accepts that solution.<sup>2</sup>

It may be noted, however, that the acts here for which defendants were held liable were committed sometime between

<sup>2</sup> See also *United States vs. Barish*, 3 Cir., 25 F. 2d 571.

March 16 and September 30, 1946, by the filing of respective priority certificates, while the first complaint was filed December 31, 1954. Even if 28 U.S.C.A. § 2462 were applicable, this complaint was timely.<sup>3</sup>

Defendant's claim that the Statute of Limitations is particularly important because of the filing of an amended complaint on November 2, 1956. The amended complaint did vary  
457 from the original in two particulars. First, the charge of fraud in the original complaint was an alleged false representation that the articles were purchased for personal use of the veteran. The allegation in the second amended complaint was to the effect that the false representation was that the veterans were the owners of more than fifty per cent of the interest in an enterprise and entitled to more than fifty per cent of the profit therein and that the purchase for resale was not for the benefit of any other dealer. The trial court ruled that the first complaint stated a cause of action under the governing statute. We agree and so rule. The minor variation as to the detail of the fraud is not of the essence. Therefore, whether the statute had run when the second amended complaint was filed is of no consequence. The filing of the first complaint in time tolled the running of any applicable statute as to the point.

Second, it is objected that the government sought to claim twice the consideration agreed to be paid in the second amended complaint, whereas in the first complaint it had prayed for \$2,000.00 for each act and double the amount of the damages of the government. There are two answers. One, the court only awarded \$2,000.00 liquidated damages to the government for each act found. Defendants have no ground to complain, since this measure of recovery was asked by the first complaint. Two, there was only one statutory remedy, as defendants claim. The amount of recovery prayed for had no effect upon substance of the claim. If a cause of action was stated, based upon the statute, the amount of recovery would

<sup>3</sup> 28 U.S.C.A. § 2462, 18 U.S.C.A. § 2387; Proclamation 2714 12-FR-1; United States vs. Grainger, 346 U.S. 1069. The government had the full day of December 31, 1954, in which to file the complaint, since hostilities were suspended at noon December 31, 1954.

be based upon the proof. The statute gave the United States three different measures of damages. Under the Federal Rules of Civil Procedure, at the end of the trial the government would be entitled to that which the court found was established by the evidence.

And here it may be well to dispose of the appeal of the government. The claim is that, since there was an election by the agents of the United States under the terms of the statute to claim twice the consideration agreed to be paid, the trial court was bound by the statute to make such an award.

This has been treated as an attempt to bind the government to an election of remedies. As above noted, there is no such question involved here. There is but one statutory  
458 cause of action. Based upon the proof at the end of the case, the government could recover damages in one of three forms. These damages in the three sections were not cumulative. The reason for the words at the election of the government is to show the noncumulative nature of the provisos. If these words mean that the government is entitled to the particular form of relief it chooses, willy-nilly, regardless of the evidence, and that the court can award that form and no other, unquestionably the proviso constitutes a criminal penalty and the courts which have construed these clauses as providing liquidated damages are wrong. But we have already rejected this thesis.

Since then these provisos give liquidated damages in various forms, the trial court had the power to give that form of relief to which he believed the government was entitled. He found, the government had proved no actual damages. Therefore, he applied the simple monetary award for each of the proven acts of presentation of a priority certificate.

This question was not raised at the trial. The trial court unquestionably believed that twice of the consideration "agreed to be paid" was not applicable here. And it seems much more apposite to a contract where the property has not passed but a consideration has been agreed upon. It cannot be said upon the record before us that the trial court reached an erroneous conclusion as to the amount of the liquidated damages which were awarded. The cross-appeal of the government has no merit.

Defendants object that the proof was not sufficient to make a case against any of them. A careful review of the record shows that the trial court correctly held "from all of the evidence that as far as these three men [Dailey, Schwartze and McFarland] it was purely synthetic . . . these men were largely messenger boys in acquiring the surplus vehicles that Mr. Hougham felt he could use in his business." The findings of the trial court were correct. It is unnecessary to burden the reports with a detail of the facts.

Affirmed.

(File endorsement omitted)

459 IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 15,873:

UNITED STATES OF AMERICA, APPELLANT

vs.

E. B. HOUGHAM, ET AL., APPELLEES

E. B. HOUGHAM, ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

JUDGMENT—FILED AND ENTERED APRIL 14, 1959

Appeals from the United States District Court for the Southern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for Southern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(File endorsement omitted)

460 IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

—Before: FEE, BARNES and HAMLIN, Circuit Judges

Minute entry of order denying petition for rehearing—September 23, 1959.

On consideration thereof, and by direction of the Court, it is ordered that the petition, of Appellant, filed May 1, 1959, and within time allowed therefor by rule of Court for a rehearing of the above-entitled cause, be, and hereby is denied.

461 (Clerk's certificate to foregoing transcript omitted in  
printing)

463 SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 605

UNITED STATES, PETITIONER

v.

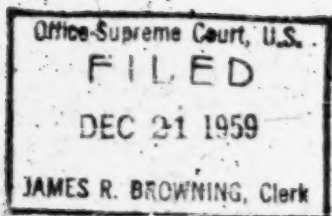
E. B. HOUGHAM, ET AL.

ORDER ALLOWING CERTIORARI. FEBRUARY 23, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY



No. — ~~605~~ 24

**In the Supreme Court of the United States**

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E.  
SCHWARTZE AND HARLAN L. MCFARLAND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

J. LEE RANKIN,

*Solicitor General,*

GEORGE COCHRAN DOUB,

*Assistant Attorney General,*

MORTON HOLLANDER,

ANTHONY L. MONDELLO,

*Attorneys,*

*Department of Justice, Washington 25, D.C.*

# INDEX

---

|                                     | Page |
|-------------------------------------|------|
| Opinions below .....                | 1    |
| Jurisdiction .....                  | 2    |
| Question presented .....            | 2    |
| Statute involved .....              | 2    |
| Statement .....                     | 3    |
| Reasons for granting the writ ..... | 8    |
| Conclusion .....                    | 12   |
| Appendix .....                      | 13   |

## CITATIONS

### Cases:

|   |        |
|---|--------|
| <i>Bernstein v. United States</i> , 256 F. 2d 697 .....   | 11, 12 |
| <i>Rex Trailer Co. v. United States</i> , 350 U.S. 148 .....  | 9      |
| <i>United States v. Doman</i> , 255 F. 2d 865, affirmed sub<br>nom. <i>Koller v. United States</i> , 359 U.S. 309 ..... | 9      |

### Statutes:

|   |                        |
|---|------------------------|
| Federal Property and Administrative Services Act of<br>1949, Section 209, 63 Stat. 392, 40 U.S.C. 489 ..... | 2, 10                  |
| Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C.<br>App. (1946 Ed.) 1611, et seq:                      |                        |
| Section 26 .....  | 2, 3, 9                |
| Section 26(b)(1) .....  | 2-3, 4, 5, 9, 10       |
| Section 26(b)(2) .....  | 3, 4, 7, 9, 10, 11, 12 |
| Section 26(b)(3) .....  | 3, 9                   |
| Section 26(d) .....   | 3                      |

### Miscellaneous:

|   |    |
|---|----|
| 1 Pomeroy's <i>Equity Jurisprudence</i> (5th Ed.), Section<br>221b .....        | 10 |
| 4 Pomeroy's <i>Equity Jurisprudence</i> (5th Ed.), Sections<br>1404, 1405 ..... | 10 |
| S. Rept. 1057, 78th Cong., 2d Sess., p. 14 .....                                | 9  |

(1)

# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E.  
SCHWARTZE AND HARLAN L. MCFARLAND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on April 14, 1959.

## OPINIONS BELOW

The opinion before trial of the United States District Court for the Southern District of California (R. 43)<sup>1</sup> is reported at 148 F. Supp. 715. That court's oral opinion after trial (R. 437), and its findings of fact, conclusions of law, and judgment (R. 105) are not reported. The opinion of the court of appeals (App., *infra*, pp. 13-19) is reported at 270 F. 2d 290.

<sup>1</sup> All record references are to the pages of the "Transcript of Record" printed for the use of the court below and filed here pursuant to Rule 24 of this Court.

### JURISDICTION

The judgment of the court of appeals was entered on April 14, 1959 (App., *infra*, p. 19). A timely petition for rehearing was denied on September 23, 1959 (App., *infra*, p. 20). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the provisions of the Surplus Property Act explicitly conferring on the United States the right to elect which of three measures of damages is to be applied in recovering for fraud in obtaining Government property permits the trial court, rather than the Government, to make the election.

### STATUTE INVOLVED

Section 26 of the Surplus Property Act of 1944, 58 Stat. 765, 780, 50 U.S.C. App. (1946 Ed.) 1635, (repealed, and reenacted by Section 209 of the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 392, 40 U.S.C. 489), provides in pertinent part as follows:

(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who en-

---

\* The 1949 reenactment made no change material here. In addition, all of the sales in question here took place before the 1949 reenactment.

ters into an agreement, combination, or conspiracy to do any of the foregoing—

(1) shall pay to the United States the sum of \$2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

\* \* \* \* \*

(d). The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

#### STATEMENT

This suit was filed by the United States to recover civil damages from the respondents who had fraudulently obtained certain Government surplus property in violation of Section 26 of the Surplus Property Act. 58 Stat. 765, 50 U.S.C. App. (1946 Ed.) 1635. In general, the complaint alleged that respondent Hougham, doing business as Baker's Motor Market, conspired with respondents Dailey, Schwartze and McFarland, who were veterans, to violate the Act. The substance of the charge was that Hougham used

the named veterans as front men to purchase for him, with the use of the veterans' priority certificates, surplus property vehicles to which Hougham was not otherwise entitled. The complaint sought \$2,000 for each violation of the Act, plus double the amount of actual damages sustained by the Government, all under Section 26(b)(1) of the Act. *Supra*, pp. 2-3. Thus, on the basis of the respondents' fraudulent purchases in 168 surplus property transactions, the complaint claimed \$336,000 plus double damages (R. 3-23).

The United States thereafter moved for leave to file a first amended complaint which sought instead, under Section 26(b)(2) of the Act, *supra*, pp. 2-3, twice the consideration agreed to be given to the United States for the fraudulently obtained property. Since the respondents had agreed to pay and had paid \$79,512.66, the complaint sought \$159,025.32, or a sum substantially less than demanded in the original complaint (R. 25-43). The district court, however, denied the Government's motion, holding that it had made an irrevocable election of remedies by filing its initial complaint (R. 116). In paragraph VII of its Pretrial Conference Order (R. 101), the district court stated that the following issue of law remained to be litigated upon the trial:

B. It is the contention of plaintiff that it is entitled to double the amount of the sales price of the vehicles described in the Second Amended Complaint, namely twice the sum of \$13,671.02 for Count One, twice the sum of \$38,131.13 for Count Two, and twice the sum of \$27,710.51 for Count Three. Previously the Court has indicated that an irrevocable election

has been made by the United States by virtue of the successive complaints on file. It is the contention of plaintiff that it is entitled to make its election at any time prior to judgment. Plaintiff elects, in the event of judgment in its favor, to receive as liquidated damages a sum equal to twice the consideration agreed to be given to the United States or federal agency involved. Plaintiff respectfully calls this to the attention of the Court so that the point may be preserved for purposes of appeal.

The trial proceeded after the Government had filed a second amended complaint which sought \$2,000 for each violation, under Section 26(b)(1) of the Act (R. 116-117).

During the trial, the United States placed in evidence as separate exhibits detailed sales folders containing sales documents bearing respondents' signatures (R. 149, 211, 215, 216-217, 230, 272, 279, 282) and describing the sales of property which took place. In this fashion, every specific sale alleged in the second amended complaint was proved to have been made as alleged.<sup>2</sup>

<sup>2</sup>The following schedule lists the record references for proof of Hougham's purchases through the other respondents and the specific price at which each sale and purchase was made.

Respondent Dailey:

*Record Reference*

General admission as to about 110 vehicles. R. 133-138.

Exhibits 8-75, corresponding to the 68 specific transactions alleged in Count I of the Second Amended Complaint (R. 58-61). R. 147-166.

Respondent Schwartze:

Exhibits 76-93, corresponding to the 29 specific transactions alleged in R. 206-207, 248.

In its findings of fact, the district court found that the Government's property had been obtained fraudulently by purchases of trucks and trailers by the respondents on the various dates described in the three counts of the second amended complaint (R. 106-107, 110-111, 112-1123).<sup>\*</sup>

While ruling that the property had been obtained fraudulently, the district court rejected the Government's contention that the purchase of each vehicle constituted a separate violation of the Act calling for separate imposition of a \$2,000 forfeiture, held instead that " \* \* \* the genesis of the whole matter are these applications \* \* \*", and assessed one \$2,000 forfeiture for each of the four fraudulent applications for a veteran's priority certificate used for the acquisition of the surplus property (R. 445-446). Accordingly, the Government's recovery was limited to \$8,000 (R. 119-120). The Government appealed on the ground that it was entitled to a damage award in the

(Footnote 3 continued)

|   |                         |
|---|-------------------------|
| Count II of the Second Amended<br>Complaint (R. 64-65). | <i>Record Reference</i> |
|---|-------------------------|

Respondent McFarland:

|   |             |
|---|-------------|
| General admission as to about 25<br>vehicles. | R. 222-226. |
|---|-------------|

|  |                      |
|--|----------------------|
| Exhibits 97-150, corresponding to the<br>52 specific transactions alleged in<br>Count III of the Second Amended<br>Complaint (R. 68-71). | R. 226-233, 272-282. |
|--|----------------------|

<sup>\*</sup>In its findings, the court states:

"Said trucks and trailers are further described in the Second Amended Complaint, Count \* \* \*, Paragraph \* \* \*, pages \* \* \*, inclusive." R. 107(2), 110(2), 112-113(2).

amount of \$159,025.32, as computed under Section 26(b)(2) of the Act.<sup>3</sup>

The court of appeals rejected the district court's ruling that the Government was bound by its first complaint under the doctrine of election of remedies. It stated that, at the end of the trial, the Government was entitled to that amount of damages which the court found was established by the evidence, and in one of the three forms provided by the statute. Although the issue of who should select the remedy was neither briefed nor argued in the district court or the court of appeals, the latter *sua sponte* raised the question in its opinion and decided that:

\* \* \* the trial court had the power to give that form of relief to which he believed the government was entitled. He found the government had proved no actual damages. Therefore, he applied the simple monetary award for each of the proven acts of presentation of a priority certificate [App., *infra*, p. 18].

Treating the district court's selection of remedy in the manner it would treat a factual finding, the court of appeals stated that it could not say on the record before it that the trial court had reached an erroneous conclusion as to the damage awards. It confirmed the district court's rejection of the application of 26(b)(2)'s formula of "twice the consideration agreed to be given", stating that such a recovery was " \* \* much more apposite to a contract where the

<sup>3</sup>The respondents also appealed contending that the evidence was insufficient to support the finding of fraud and that the Government's action was barred by limitations. The court of appeals rejected both arguments (App., *infra*, pp. 15-17, 18-19).

property has not passed but a consideration has been agreed upon" (App., *infra*, p. 18). The district court's judgment was thus affirmed.

#### REASONS FOR GRANTING THE WRIT

The decision below, which gives to the trial court and not the United States the option to select one of the three alternative remedies of the Surplus Property Act, is directly contrary to the explicit language of the Act. It is also inconsistent with the prior understanding of the Act implicitly held by all courts which have passed upon the statute since the days of World War II. Earlier Surplus Property Act matters have all been settled or otherwise handled on the assumption that the Act means precisely what it says when it confers on the "United States" the right to elect one of the three different measures of damages. Moreover, the Surplus Property Act is permanent legislation<sup>6</sup> under which untold quantities of Government surplus will be disposed of in the future. In addition, the decision below, if not reversed, may affect the disposition of 22 cases currently pending in various district courts, 37 other matters in which the filing of an action is under consideration, and an indefinite number of future cases in which dispositions of property under the Act are tainted with fraud. Finally, a conflict, at least in reasoning, between the decision below and that of the Court of Appeals for the Tenth Circuit in another recent Surplus Property Act case emphasizes still further the need for review here.

<sup>6</sup> See footnote 2, *supra*, p. 2.

1. During the fifteen years of administration of these provisions of the Act, no one has ever challenged the right of the *United States* as plaintiff to select one of the statute's three alternative remedies. The courts regularly have noted in cases brought under the Act that the United States as plaintiff, and not the court, is to make the election. The statute's language, " \* \* \* if the United States shall so elect \* \* \* ", prohibits any other result. And that the right to elect is in the United States, not in the courts, is fully confirmed by the Senate Report on the bill which became the Surplus Property Act. The Report unequivocally states that "The United States is given the option of electing among three different measures of damages \* \* \* " (S. Rept. 1057, 78th Cong., 2d Sess., p. 14).

In the context of the entire provision for remedies and court jurisdiction in Section 26, it seems plain that the characterization "United States" describes the executive branch which manages the Government's property and brings suit on behalf of the United States when it is harmed. The appellation "United States" is used nine times in subparts (1), (2), and (3) of Section 26(b) of the Act, and the seven references (apart from the two linked to the language of elec-

<sup>1</sup> For example, in *Ree Trailer Co. v. United States*, 350 U.S. 148, 150, this Court notes that "The United States limited itself to the recovery \* \* \*"; and in *United States v. Doman*, 255 F.2d 865, 869 (C.A. 3), affirmed *sub nom. Koller v. United States*, 359 U.S. 309, the court states that " \* \* \* the United States was to have the option of selecting as its remedy any one of the three different measures of damages \* \* \* ".

tion) clearly apply to the executive branch of the Government in the sense just noted, since they refer to restoration of property, retention of money, and payment of consideration to the "United States." Where the courts are properly involved in the Act, Congress had no difficulty in describing "[t]he several district courts of the United States \* \* \*". 40 U.S.C. 489(c).

From the terms and context of the statute, it is thus plain that it is the United States as litigant, and not the trial court, which has the option of electing one of the Act's three remedies.

2. The decision below, in addition to departing from settled judicial recognition of the traditional right of a litigant to a particular remedy of his own choosing,<sup>8</sup> destroys the very purpose of providing the alternative remedies. Because of problems of proof,<sup>9</sup> it is often

<sup>8</sup> Illustrative is the rule that a vendee of real property who anticipates special uses for the land he has contracted to buy is entitled to damages for breach of his contract by the vendor, and is also entitled to specific performance. It is not the court's function, but the litigant's, to decide which remedy it will be; and if he proves all the incidents which equity requires for specific performance, he is entitled to the remedy he seeks. See 1 Pomeroy's *Equity Jurisprudence* (5th Ed.), Section 221b; 4 *id.* Sections 1404, 1405.

<sup>9</sup> The decision below creates an obvious practical problem for litigating counsel who will not know what proof to prepare for trial unless they know which remedy the court will select after trial. It is relatively simple, for example, to prove the consideration agreed to be given under Section 26(b) (2); while proof of the value of surplus property—for the purpose of settling actual damages under Section 26(b) (1)—may well involve the use of trade experts, accountants and other witnesses, and entail costly and extended arrangements. Cautious counsel would accordingly make a record which supports any remedy the court

difficult for the Government to establish the full extent of its loss from fraud. In order to be sure that under every circumstance the Government shall be able to make itself entirely whole, the Congress gave it the option to select the measure of damages which would best fit its need in particular cases. The court below would deprive the Government of that power in favor of a method of selection on some undefined basis which the court feels makes one recovery more appropriate than another.<sup>10</sup> The fact that the court below felt that the measure of twice the consideration agreed to be paid is inappropriate where a transaction has been completed itself illustrates the manner in which a court can deprive the United States of a measure of recovery which Congress certainly did not indicate was to be limited to incomplete transactions.

3. In its essentials, the decision below is in conflict with the principle underlying the recent decision in *Bernstein v. United States*, 256 F. 2d 697 (C.A. 10). In *Bernstein*, the district court, on the basis of application of the doctrine of election of remedies, might select, thus needlessly consuming valuable court time and adding to already congested dockets.

<sup>10</sup> Except for the unwarranted assumption implicit in the court of appeals' statement that "[i]f these words mean that the government is entitled to the particular form of relief it chooses, willy-nilly, regardless of the evidence \* \* \*" (App., *infra*, p. 18, emphasis added), there is no indication that the court found fault with the Government's proof, or thought that the Government's case did not warrant Section 26(b)(2) recovery. As we note above, pp. 4-5, the district court ruled the 26(b)(2) recovery inapplicable solely on the basis of the Government's previous election of another remedy. And we have already shown (*supra*, pp. 5-6) the adequacy of the Government's proof to support the 26(b)(2) remedy.

had held the Government to the 26(b)(2) election embodied in its initial complaint. Its rationale was that the Government's subsequent demand alternatively for a different remedy was unfair to the defendants who might have conducted their subsequent business of selling about 30% of the surplus property they had bought in light of the Government's earlier 26(b)(2) demand. In effect, from facts related solely to its own notions of the fairness of choice from among these alternatives, the district court held the Government to its original selection. The Court of Appeals for the Tenth Circuit reversed, rejected the election of remedies doctrine under the Federal Rules of Civil Procedure, and remanded the case with a direction to grant the remedy of restitution which the Government had finally demanded. Thus, the *Bernstein* case stands for the proposition that the Government's final choice of a supported remedy must be respected. In the instant case, however, the court below held that the Government's choice was not controlling. This conflict in principle demonstrates, we submit, the need for review and reversal of the decision below.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

J. LEE RANKIN,  
*Solicitor General.*  
 GEORGE COCHRAN DOUB,  
*Assistant Attorney General.*  
 MORTON HOLLANDER,  
 ANTHONY L. MONDELLO,  
*Attorneys.*

DECEMBER 1959.

## APPENDIX

United States Court of Appeals for the Ninth Circuit

No. 15,873. April 14, 1959

UNITED STATES OF AMERICA, APPELLANT

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND HARLAN L. MCFARLAND, APPELLEES

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND HARLAN L. MCFARLAND, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN  
DIVISION

Before FEE, BARNES and HAMLIN, *Circuit Judges*

JAMES ALGER FEE, *Circuit Judge*:

This action was instituted to ~~recover damages on~~ account of the fraudulent acquisition of surplus property in violation of the provisions of the Surplus Property Act of 1944.<sup>1</sup> It was claimed that defendant E. B. Hougham, individually and, under the assumed business name of Baker's Motor Market, had Owen Dailey, William E. Schwartze and Harland L. McFarland, the other defendants, purchase for him sur-

<sup>1</sup> 58 Stat. 765, 50 U.S.C.A. (1946 Ed.) §§ 1611-16.

plus property vehicles from the government. These purchases were charged to have been accomplished by the use of priority certificates of veterans which belonged to the other defendants, respectively. It was claimed that Hougham could not otherwise have obtained title to such vehicles.

The record showed that each of the defendant veterans filed with the War Assets Administration an application for a certificate to enable him to purchase war surplus material on a priority basis. Upon the representations in the applications filed by these veterans, priority certificates were issued to each respectively. In each application presented by a defendant veteran, there was a representation reading as follows:

I am, or will be, directly or indirectly, the sole proprietor of the enterprise described herein, or, that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof; \* \* \* that said property is to be used in and as part of the enterprise described herein.

The evidence also proved that Hougham had a large establishment and that defendant veterans were financed by him to purchase the property on the priority certificates; the vehicles were delivered to Hougham, who treated them as his own; the veterans received \$10.00 from Hougham.

The cause was tried by the court without a jury. A judgment was entered against Hougham and Dailey for \$2,000.00, against Hougham and Schwartz for \$2,000.00, and against Hougham and McFarland for \$4,000.00. These sums were described as "liquidated damages." The court ruled that the government had presented no proof of actual damage.

A major point raised is whether the action is barred by the Statute of Limitations. The court ruled that no statutory provision was applicable to bar the action.

It was claimed that the bringing of the action was limited by 28 U.S.C.A. § 2462, which reads:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

The trial court ruled that the section above quoted did not apply and that, since the Surplus Property Act of 1944 contained no provision for limitation, the action therein authorized could be commenced at any time. It is significant in this connection that the trial court gave judgment for \$2,000.00 for each act.

The exact point has been ruled upon by the Court of Appeals for the Third Circuit in the case of *United States v. Doman*, 255 F. 2d 865, 867, where it is said:

The narrow issue, therefore, is whether Section 26(b)(1) of the Surplus Property Act, which requires a person committing the prohibited act to pay the United States the sum of two thousand dollars for each fraudulent act in addition to double the amount of any damages which the United States may have sustained by reason of Koller's and Silberbrook's activities provides a civil fine, a penalty, or a forfeiture, or merely compensatory damages.

That court, citing the opinion of Judge Jertrberg in the instant case, pointed out that the Supreme Court of the United States, in *Rex Trailer Co. v. United States*, 350 U.S. 148, had held that the provisions of Section

26(b)(1) are civil and not criminal, although the point of limitation upon an action was not involved, but, concluded the later opinion resolved the conflict among the circuits as to the existence of a bar. This Court accepts that solution.<sup>2</sup>

It may be noted, however, that the acts here for which defendants were held liable were committed sometime between March 16 and September 30, 1946, by the filing of respective priority certificates, while the first complaint was filed December 31, 1954. Even if 28 U.S.C.A. § 2462 were applicable, this complaint was timely.<sup>3</sup>

Defendants claim that the Statute of Limitations is particularly important because of the filing of an amended complaint on November 2, 1956. The amended complaint did vary from the original in two particulars. First, the charge of fraud in the original complaint was an alleged false representation that the articles were purchased for personal use of the veteran. The allegation in the second amended complaint was to the effect that the false representation was that the veterans were the owners of more than fifty per cent of the interest in an enterprise and entitled to more than fifty per cent of the profit therein and that the purchase for resale was not for the benefit of any other dealer. The trial court ruled that the first complaint stated a cause of action under the governing statute. We agree and so rule. The minor variation as to the detail of the fraud is not of the essence. Therefore, whether the statute had run when the

<sup>2</sup> See also *United States v. Barish*, 3 Cir., 256 F. 2d 571.

<sup>3</sup> 28 U.S.C.A. § 2462, 18 U.S.C.A. § 3287; Proclamation 2714 12-FR-1; *United States v. Grainger*, 346 U.S. 235. The government had the full day of December 31, 1954, in which to file the complaint, since hostilities were suspended at noon December 31, 1954.

second amended complaint was filed is of no consequence. The filing of the first complaint in time tolled the running of any applicable statute as to the point.

Second, it is objected that the government sought to claim twice the consideration agreed to be paid in the second amended complaint, whereas in the first complaint it had prayed for \$2,000.00 for each act and double the amount of the damages of the government. There are two answers. One, the court only awarded \$2,000.00 liquidated damages to the government for each act found. Defendants have no ground to complain, since this measure of recovery was asked by the first complaint. Two, there was only one statutory remedy, as defendants claim. The amount of recovery prayed for had no effect upon substance of the claim. If a cause of action was stated, based upon the statute, the amount of recovery would be based upon the proof. The statute gave the United States three different measures of damages. Under the Federal Rules of Civil Procedure, at the end of the trial the government would be entitled to that which the court found was established by the evidence.

And here it may be well to dispose of the appeal of the government. The claim is that, since there was an election by the agents of the United States under the terms of the statute to claim twice the consideration agreed to be paid, the trial court was bound by the statute to make such an award.

This has been treated as an attempt to bind the government to an election of remedies. As above noted, there is no such question involved here. There is but one statutory cause of action. Based upon the proof at the end of the case, the government could recover damages in one of three forms. These damages in the three sections were not cumulative. The reason for the words at the election of the govern-

ment is to show the noncumulative nature of the provisos. If these words mean that the government is entitled to the particular form of relief it chooses, willy-nilly, regardless of the evidence, and that the court can award that form and no other, unquestionably the proviso constitutes a criminal penalty and the courts which have construed these clauses as providing liquidated damages are wrong. But we have already rejected this thesis.

Since then these provisos give liquidated damages in various forms, the trial court had the power to give that form of relief to which he believed the government was entitled. He found the government had proved no actual damages. Therefore, he applied the simple monetary award for each of the proven acts of presentation of a priority certificate.

This question was not raised at the trial. The trial court unquestionably believed that twice of the consideration "agreed to be paid" was not applicable here. And it seems much more apposite to a contract where the property has not passed but a consideration has been agreed upon. It cannot be said upon the record before us that the trial court reached an erroneous conclusion as to the amount of the liquidated damages which were awarded. The cross appeal of the government has no merit.

Defendants object that the proof was not sufficient to make a case against any of them. A careful review of the record shows that the trial court correctly held "from all of the evidence that as far as these three men [Dailey, Schwartz and McFarland] it was purely synthetic \* \* \* these men were largely messenger boys in acquiring the surplus vehicles that Mr. Hougham felt he could use in his business." The findings of the trial court were correct. It is unnecessary to burden the reports with a detail of the facts.

**Affirmed.**

United States Court of Appeals for the Ninth Circuit

No. 15,873

UNITED STATES OF AMERICA, APPELLANT

v.

E. B. HOUGHAM, ET AL., APPELLEES

E. B. HOUGHAM, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*Judgment*

Filed and entered April 14, 1959.

APPEALS FROM THE UNITED STATES DISTRICT COURT, FOR  
THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN  
DIVISION

This cause came on to be heard on the Transcript  
of the Record from the United States District Court  
for Southern District of California, Northern Divi-  
sion, and was duly submitted.

On consideration whereof, it is now here ordered  
and adjudged by this Court, that the Judgment of the  
said District Court in this cause be, and hereby is  
affirmed.

United States Court of Appeals for the Ninth Circuit

Excerpt From Proceedings of Wednesday, September  
23, 1959

Before FEE, BARNES and HAMLIN, *Circuit Judges*

*Order denying petition for rehearing*

On consideration thereof, and by direction of the Court, it is ordered that the petition of Appellant, filed May 1, 1959, and within time allowed therefor by rule of Court for a rehearing of the above-entitled cause be, and hereby is denied.

EX COPY

FILED  
AUG 20 1960  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

No. 24

---

**In the Supreme Court of the United States**

OCTOBER TERM, 1960

---

UNITED STATES OF AMERICA, PETITIONER

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E.  
SCHWARTZ AND HARLAN L. MCFARLAND

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

---

**BRIEF FOR THE UNITED STATES**

---

**J. LEE RANKIN,**

*Solicitor General,*

**GEORGE COCHRAN DOUB,**

*Assistant Attorney General,*

**MORTON HOLLANDER,**

**ANTHONY L. MONDELLO,**

*Attorneys,*

*Department of Justice, Washington 25, D.C.*

---

---

## INDEX

---

|   | Page |
|---|------|
| Opinions below .....  | 1    |
| Jurisdiction .....  | 1    |
| Questions presented .....   | 2    |
| Statute involved .....  | 2    |
| Statement .....   | 4    |
| Summary of argument .....   | 8    |
| Argument .....  | 10   |
| I. The Surplus Property Act specifically<br>gives the United States, and not the<br>district court, the option of selecting<br>among the statute's alternative meas-<br>ures of damages ..... | 10   |
| II. This case has not been mooted by the<br>acceptance by the United States of<br>promissory notes in payment of the<br>lesser amount awarded by the district<br>court .....                  | 17   |
| Conclusion .....  | 20   |

## CITATIONS

### Cases:

|   |        |
|---|--------|
| <i>Armstrong v. Lone Star Refining Co.</i> , 20 F. 2d<br>625 .....                                | 19     |
| <i>Automobile Ins. Co. v. Barnes-Manley</i> , 168 F.<br>2d 381 .....                              | 19     |
| <i>Carson Lumber Co. v. Saint Louis &amp; San<br/>Francisco Railroad Co.</i> , 209 Fed. 191 ..... | 19     |
| <i>Daniel v. United States</i> , 234 F. 2d 102 .....  | 16     |
| <i>Embry v. Palmer</i> , 107 U.S. 3 .....   | 10, 18 |

## Cases—Continued

|   |            |
|---|------------|
| <i>Erwin v. Lowry</i> , 7 How. 172 .....  | 10, 18, 20 |
| <i>Fifth Avenue Bank of New York v. Hammond Realty Co.</i> , 130 F. 2d 993, certiorari denied sub nom. <i>McHie v. Fifth Avenue Bank, Executor</i> , 318 U.S. 765 ..... | 19         |
| <i>Lanier v. Nash</i> , 122 U.S. 637 .....  | 20         |
| <i>Luther v. United States</i> , 225 F. 2d 495 .....  | 19         |
| <i>Mudd v. Perry</i> , 25 F. 2d 85 .....  | 19         |
| <i>Peck v. Richter</i> , 217 Fed. 880 .....   | 19         |
| <i>Reynes v. Dumont</i> , 130 U.S. 354 .....  | 19         |
| <i>Rex Trailer Co. v. United States</i> , 350 U.S. 148 .....  | 11,        |
|   | 12, 14, 15 |
| <i>Snow v. Hazlewood</i> , 179 Fed. 182 .....   | 19         |
| <i>Solomon v. United States</i> , 276 F. 2d 669, pending on petition for certiorari, No. 133, this Term .....   | 16         |
| <i>United States v. Bernstein</i> , 149 F. Supp. 568, reversed 256 F. 2d 697 .....  | 13, 16     |
| <i>United States v. Dashiell</i> , 3 Wall. 688 .....  | 19         |
| <i>United States v. Doman</i> , 255 F. 2d 865, affirmed sub nom. <i>Koller v. United States</i> , 359 U.S. 309 .....  | 11, 12     |
| <i>United States v. Rubin</i> , 243 F. 2d 900 .....   | 16         |
| <i>United States ex rel. Marcus v. Hess</i> , 317 U.S. 537 .....  | 17         |
| <i>Walters v. Fulton</i> , 14 F. 2d 107 .....   | 19         |
| <i>Worthington v. Beeman</i> , 91 Fed. 232 .....  | 19         |

## Statutes:

|  |                      |
|--|----------------------|
| Federal Property and Administrative Services Act of 1949, Section 209, 63 Stat. 392, 40 U.S.C. 489 ..... | 2                    |
| Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C. App. (1946 ed.) 1611, et seq.:                     |                      |
| Section 2 .....  | 15                   |
| Section 26 .....   | 24                   |
| Section 26(b) .....  | 2, 8, 10, 11, 13, 15 |

## Statutes—Continued

## Surplus Property Act of 1944—Continued

|                        | Page                    |
|------------------------|-------------------------|
| Section 26(b)(1) ..... | 3, 4, 5, 7, 15, 17      |
| Section 26(b)(2) ..... | 3, 4, 8, 13, 15, 16, 17 |
| Section 26(b)(3) ..... | 3, 15                   |
| Section 26(c) .....    | 3                       |
| Section 26(d) .....    | 4                       |

## Miscellaneous:

|   |    |
|---|----|
| Hearings, Department of Defense Appropriations for 1960, Subcommittee of the Senate Committee on Appropriations, on H.R. 7454, 86th Cong., 1st Sess. .... | 11 |
| S. Rep. 1057, 78th Cong., 2d Sess. ....   | 12 |
| S. Rep. 1142, 79th Cong., 2d Sess. ....   | 13 |

# In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 24

UNITED STATES OF AMERICA, PETITIONER

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E.  
SCHWARTZE AND HARLAN L. MCFARLAND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR THE UNITED STATES

### ° OPINIONS BELOW

The opinion before trial of the District Court for the Southern District of California (R. 43-55) is reported at 148 F. Supp. 715. That court's oral opinion after trial (R. 437-447), and its findings of fact, conclusions of law, and judgment (R. 105-120) are not reported. The opinion of the court of appeals is reported at 270 F.2d 290.

### JURISDICTION

The judgment of the court of appeals was entered on April 14, 1959 (R. 453). A timely petition for rehearing was denied on September 23, 1959 (R. 459).

The petition for a writ of certiorari was filed on December 21, 1959, and granted on February 23, 1960 (R. 459; 361 U.S. 958). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

#### QUESTIONS PRESENTED

1. Whether the provisions of the Surplus Property Act, which explicitly confer on the United States the right to elect among three measures of damages in recovering for fraud committed in obtaining Government property, permit the trial court, rather than the Government, to make the election.

2. Whether as a result of arrangements made to collect the lesser judgment entered in favor of the United States by the district court, and not challenged here by respondents, this case has become moot.

#### STATUTE INVOLVED

Section 26 of the Surplus Property Act of 1944, 58 Stat. 765, 780, 50 U.S.C. App. (1946 ed.) 1635 (repealed, and reenacted by Section 209 of the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 392, 40 U.S.C. 489), provides in pertinent part as follows:

(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any

<sup>1</sup>The 1949 reenactment made no change material here. In addition, all of the sales in question here took place before the 1949 reenactment.

Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—

(1) shall pay to the United States the sum of \$2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

(c) The several district courts of the United States, the District Court of the United States for the District of Columbia, and the several district courts of the Territories of the United States, within whose jurisdictional limits the person, or persons, doing or committing such act, or any one of them, resides or shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

#### STATEMENT

This suit was filed by the United States to recover civil damages from the respondents who had fraudulently obtained certain Government surplus property in violation of Section 26 of the Surplus Property Act, 58 Stat. 765, 50 U.S.C. App. (1946 ed.) 1635. The complaint alleged that respondent Hougham, doing business as Baker's Motor Market, conspired with respondents Dailey, Schwartz, and McFarland, who were veterans, to violate the Act. The substance of the charge was that Hougham used the named veterans as front men to purchase for him, with the use of veterans' priority certificates, surplus property to which Hougham was not otherwise entitled. The complaint sought under Section 26(b)(1) of the Act, \$2,000 for each violation of the Act, plus double the amount of actual damages sustained by the Government. Thus, on the basis of the respondents' fraudulent purchases in 168 surplus property transactions, the complaint claimed \$336,000 plus double damages (R. 3-23).

The United States thereafter moved for leave to file a first amended complaint which instead sought under Section 26(b)(2) of the Act, twice the consideration agreed to be given to the United States for the fraudulently obtained property. Since the respondents had agreed to pay and had paid \$79,512.66, the complaint sought \$159,025.32, or a sum substan-

tially less than demanded in the original complaint (R. 25-43). The district court, however, denied the Government's motion, holding that it had made an irrevocable election of remedies by filing its initial complaint (R. 116). In paragraph VII of its Pre-trial Conference Order, the district court stated that the following issue of law remained to be litigated upon the trial (R. 101.):

B. It is the contention of plaintiff that it is entitled to double the amount of the sales price of the vehicles described in the Second Amended Complaint, namely twice the sum of \$13,671.02 for Count One, twice the sum of \$38,131.13 for Count Two, and twice the sum of \$27,710.51 for Count Three. Previously the Court has indicated that an irrevocable election has been made by the United States by virtue of the successive complaints on file. It is the contention of plaintiff that it is entitled to make its election at any time prior to judgment. Plaintiff elects, in the event of judgment in its favor, to receive as liquidated damages a sum equal to twice the consideration agreed to be given to the United States or federal agency involved. Plaintiff respectfully calls this to the attention of the Court so that the point may be preserved for purposes of appeal.

The trial proceeded after the Government had filed a second amended complaint which sought, under Section 26(b)(1) of the Act, \$2,000 for each violation (R. 55-73).

During the trial, the United States placed in evidence, as separate exhibits, detailed sales folders

containing sales documents bearing respondents' signatures (R. 149, 211, 215, 216-217, 230, 272, 279, 282) and describing the sales of property which took place. In this fashion, every specific sale alleged in the second amended complaint was proved to have been made as alleged.\*

In its findings of fact, the district court found that the Government's property had been obtained fraudulently by purchases of trucks and trailers by the respondents on the various dates described in the three counts of the second amended complaint (R. 106-107, 110-111, 112-113). But, while ruling that the property had been obtained fraudulently, the district court rejected the Government's contention that the purchase of each vehicle constituted a separate violation of the Act calling for separate imposition of a \$2,000 forfeiture.° Instead, the court held that " \* \* \* the genesis of the whole matter are these applications \* \* \*," and assessed one \$2,000 forfeiture for each of the four fraudulent applications for a

\* The following schedule lists the record references for proof of Hougham's purchases through the other respondents and the specific price at which each sale and purchase was made.

**Respondent Dalley:**

|   | <i>Record Reference</i> |
|---|-------------------------|
| General admission as to about 110 vehicles....  | R. 133-138.             |
| Exhibits 8-75, corresponding to the 68 specific transactions alleged in Count I of the Second Amended Complaint (R. 58-61). | R. 147-166.             |

**Respondent Schwartz:**

|   |                  |
|---|------------------|
| Exhibits 76-93, corresponding to the 29 specific transactions alleged in Count II of the Second Amended Complaint (R. 64-65). | R. 206-207, 246. |
|---|------------------|

**Respondent McFarland:**

|   |                      |
|---|----------------------|
| General admission as to about 25 vehicles....   | R. 222-226.          |
| Exhibits 97-150, corresponding to the 52 specific transactions alleged in Count III of the Second Amended Complaint (R. 68-71). | R. 226-233, 272-282. |

veteran's priority certificate used for the acquisition of the surplus property (R. 445-446).<sup>3</sup> Accordingly, the Government's recovery was limited to \$8,000 (R. 119-120). The Government appealed on the ground that it was entitled to a damage award in the amount of \$159,025.32, as computed under Section 26(b)(2) of the Act.<sup>4</sup>

The court of appeals rejected the district court's ruling that the Government was bound by its first complaint under the doctrine of election of remedies. It stated that, at the end of the trial, the Government was entitled to that amount of damages which the

<sup>3</sup> Since the district court's rulings limited the United States to recovery under Section 26(b)(1) (R. 116-117), and since no actual damages were proved, the amount of recovery depended upon the number of \$2,000 forfeitures applicable to the facts in the case. Of four possible alternative bases for imposing forfeitures under Section 26(b)(1), the district court selected the one least favorable to the Government. The possible alternatives for imposing forfeitures, and the respective total liability computed thereon, are described by the following schedule:

|  | Dalley | Schwartz | McFarland | Totals | Liability computed at \$2000 |
|--|--------|----------|-----------|--------|------------------------------|
| Separate items of property purchased.....                | 68     | 29       | 52        | 149    | \$298,000                    |
| Separate purchases.....                                  | 14     | 10       | 12        | 36     | 72,000                       |
| Separate days on which one or more sales took place..... | 7      | 7        | 9         | 23     | 46,000                       |
| Certificates used in making purchases.....               | 1      | 1        | 2         | 4      | 8,000                        |

This information is computed from data found in the Second Amended Complaint (R. 55-73).

<sup>4</sup> The respondents also appealed contending that the evidence was insufficient to support the finding of fraud and that the Government's action was barred by limitations. The court of appeals rejected both arguments. 270 F. 2d at 292-293.

court found was established by the evidence, in one of the three forms provided by the statute. Although the issue of who should select the remedy was neither briefed nor argued in the district court or the court of appeals, the latter court *sua sponte* raised the question in its opinion and decided that (270 F. 2d at 293):

\* \* \* the trial court had the power to give that form of relief to which he believed the government was entitled. He found the government had proved no actual damages. Therefore, he applied the simple monetary award for each of the proven acts of presentation of a priority certificate.

The court of appeals stated that the formula found in Section 26(b)(2) of "twice the consideration agreed to be paid," was "\* \* \* much more apposite to a contract where the property has not passed but a consideration has been agreed upon." 270 F. 2d at 293. The court therefore held that it could not say on the record before it that the trial court had reached an erroneous conclusion as to the damage awards, and affirmed the district court judgment.

A petition for rehearing, challenging the court of appeals' holding that the Government lacked the power to select the remedy it deemed appropriate, was timely filed but was denied (R. 459).

#### SUMMARY OF ARGUMENT

##### I

Section 26(b) of the Surplus Property Act of 1944 contains three alternative remedies and specifically

provides that the choice of the appropriate statutory remedy in a particular case is to be made by the United States, and not by the district court. In terms, it states that each of the latter two remedies is to be available "if the *United States* shall so elect" (emphasis added). The legislative history of the Act expressly confirms that this reading of the language is correct. No litigant has ever before challenged this interpretation, and the courts have likewise always regarded the Act as granting the power of selection of remedy to the United States as plaintiff. The contrary view of the court below in this case, *sua sponte* and alone, stands against the specific statutory language, legislative history, and universally accepted interpretation since the passage of the Act.

The express language of the Act giving the United States the choice of remedy is fully consistent with the policy of the Act. Frauds perpetrated in obtaining surplus property cause serious damage to the objectives which the Act was designed to protect: the property interests of the Government and its interest in aiding bona fide veterans returning to civilian life. Since the damage to the Government's interests by frauds such as that involved here cannot be computed with mathematical certainty, Congress provided for alternative remedies in the form of liquidated damages to provide a measure of recovery. It was consistent with these aims for Congress to provide—as it specifically did—for the election among the several remedies to be in hands of the Government. The Government, in view of its familiarity with the ad-

ministration of the Act and the handling of Government property, is in the best position to select the specific remedy needed in a particular situation to protect the objectives of the Act and to make itself whole.

## II

Respondents suggest that this case has been mooted by the Government's acceptance of promissory notes in payment of the \$8,000 district court judgment which has become final and conclusive against them. But this Court has held that a petitioner is not precluded from seeking reversal of a judgment merely because he accepts payment of that part of the judgment to which he would in any event be entitled. *Embry v. Palmer*, 107 U.S. 3; *Erwin v. Lowry*, 7 How. ~~U.S.~~ 172. Therefore, the controversy as to whether the judgment in favor of the Government should be larger than \$8,000 continues, and the case is not moot.

## ARGUMENT

### I

THE SURPLUS PROPERTY ACT SPECIFICALLY GIVES THE UNITED STATES, AND NOT THE DISTRICT COURT, THE OPTION OF SELECTING AMONG THE STATUTE'S ALTERNATIVE MEASURES OF DAMAGES

Section 26(b) of the Surplus Property Act, *supra*, pp. 2-3,<sup>5</sup> provides three remedies for the Govern-

<sup>5</sup> The Act, having been repealed and substantially reenacted as the Federal Property and Administrative Services Act of 1949, now constitutes permanent legislation and is the statutory framework for the sale of vast quantities of Government surplus property. The Department of Defense, disposed of

ment against persons obtaining surplus property under the Act by means of fraud: first, \$2,000 for each fraudulent act plus double any damage to the United States; second, twice the sum agreed to be paid to the United States for the property; and third, restoration of the property to the United States and retention by the United States of any consideration paid for the property. The decision below, which takes away from the United States and gives to the trial court the option to select one of these three alternative remedies, is directly contrary to the explicit language of the Act, its legislative history, and its accepted interpretation for over fifteen years.

The language of Section 26(b) is conclusive. It provides three "alternative remedies" which are "*in pari materia*" (*United States v. Doman*, 255 F. 2d 863, 869 (C.A. 3), affirmed *sub nom. Koller v. United States*, 359 U.S. 309), and each of which is "of the same nature and designed to serve the same purpose." *Rex Trailer Co. v. United States*, 350 U.S. 148, 151-

property which had become excess to its needs worth approximately 6 billion dollars (acquisition cost) in 1958 and 8 billion dollars in 1959. It is estimated that such property worth 10 billion dollars will be disposed of during 1960. About 60% of this value is represented by surplus demilitarized equipment sold as scrap and salvage. An additional one-third of it is sold as usable property. See Hearings, Department of Defense Appropriations for 1960, Subcommittee of the Senate Committee on Appropriations, on H.R. 7454, 86th Cong., 1st Sess., p. 925. Accordingly, approximately nine-tenths of the total annual disposition of surplus military property is sold to the public and is subject (along with other Government surplus property disposed of by other agencies) to the Federal Property and Administrative Services Act of 1949, as amended.

152. In terms, it provides that the choice of the appropriate statutory remedy is to be made by the United States and not the trial court. The statute states the first remedy; then it sets forth, alternatively, the second remedy "if the *United States* shall so elect"; and last it gives, alternatively, the third remedy, again "if the *United States* shall, so elect" (emphasis added). That the statute means just what it says in conferring the right to elect on the United States, not on the courts, is further confirmed by the Senate Report on the bill which became the Surplus Property Act of 1944. The Report unequivocally states that "The United States is given the option of electing among three different measures of damages \* \* \*." S. Rep. 1057, 78th Cong., 2d Sess., p. 14. It would have been difficult for a Committee of Congress to have expressed itself more clearly with respect to this question.

In light of this language and legislative history, it is not surprising that, during the fifteen years of administration of these provisions of the Act, no litigant has ever before challenged the right of the United States as plaintiff to select among the statute's three alternative remedies. For the same reason all courts—with the sole exception of the court of appeals in the present case—have consistently considered that the United States as plaintiff, and not the court, is to make the election.<sup>6</sup> The statute's unmistakable lan-

<sup>6</sup> For example, in *Lee Tractor Co. v. United States*, 350 U.S. 148, 150, this Court said that "The United States limited itself to the recovery \* \* \*"; and in *United States v. Doman*, 255 F. 2d 865, 869 (C.A. 3), affirmed *sub nom. Koller v. United States*.

guage \* \* \* if the United States shall so elect \* \* \*, "excludes any other result."

The express language of Section 26(b) giving the United States the choice of remedy is fully consistent with the policy of the Act. In order to help veterans of World War II to readjust to civilian life, the Government was willing to sell property to them on more favorable terms than would obtain in the open market. But the Government was *not* willing to sell such property to those who did not fit the scheme of priority established by Congress and the Administrator. Even if the Government had been so willing,

359 U.S. 309, the court stated that " \* \* \* the United States was to have the option of selecting as its remedy any one of the three different measures of damages \* \* \*." On this phase of the case, it must be noted too that, in its essentials, the decision below is in conflict with the principle underlying the recent decision in *Bernstein v. United States*, 256 F. 2d 697 (C.A. 10). In *Bernstein*, the district court, on the basis of application of the doctrine of election of remedies, had held the Government to recovery under Section 26(b)(2) as requested in its initial complaint. Its rationale was that the Government's subsequent demand alternatively for a different remedy was unfair to the defendants who might have conducted their subsequent business of selling about 30% of the surplus property they had bought in light of the Government's earlier demand under Section 26(b)(2). The Court of Appeals for the Tenth Circuit reversed, rejecting the election of remedies doctrine, and remanded the case with a direction to grant the remedy which the Government had finally demanded. Thus, the *Bernstein* case stands for the proposition that the Government's final choice of a remedy must be respected. In the instant case, however, the court below held that the Government's choice was not controlling.

S. Rep. 1142, 79th Cong., 2d Sess., p. 3, reflects the high position of veterans in the priority scheme. First, selected surplus property—including some of the property involved

there is no indication that it would have been willing to sell the property generally at the same price and under the same conditions as it sold to veterans. Thus, respondents' fraud not only induced the Government to sell property to a person with whom it had no intention of dealing, but also to sell the property at low prices to a person not entitled to priority. Plainly, this caused damage to the Government and its interests, and hindered the fulfillment of the high aims Congress set for the Surplus Property Act. Moreover, fraudulent purchases necessarily reduce the amount of surplus property available for other disposition. Therefore, it is possible that Government agencies which are entitled to the next priority may be compelled to purchase such property elsewhere at higher prices. While Congress was agreeable to that result to the extent that veterans were the priority purchasers, it intended that Government agencies have the next priority after veterans.\* In sum, it is as true here, as it was in *Ree Trailer Co. v. United States*, 350 U.S. 148, 153, that the fraudulent sales to respondents " \* \* " precluded bona fide sales to veterans, decreased the number of

here—is set aside for exclusive disposal to veterans. The list of priorities for property not so set aside is as follows:

1. Federal Government.
2. Veterans generally.
3. Small business.
4. States and their political subdivisions and instrumentalities.

\* This is true only as to the property involved here which was set aside for veterans. As to the other property, federal agencies had first priority before veterans. See *supra*, note 7.

motor vehicles available to Government agencies, and tended to promote undesirable speculation."

These elements of damage to the various interests of the United States, as described in the objectives of the Act,<sup>9</sup> cannot be computed with mathematical precision. Congress was fully aware of this and therefore in Section 26(b) of the Act attempted to avoid this difficulty as far as possible. This was done by providing for alternative remedies in the form of liquidated damages, the last two being expressly so described in the Act. See Section 26(b)(2), (3), *supra*, p. 3; *Rex Trailer Co. v. United States*, *supra*, 350 U.S. at 151. As this Court said in *Rex Trailer*, *supra*, at 153-154, "The damages resulting from [the] injury may be difficult or impossible to ascertain, but it is the function of liquidated damages to provide a measure of recovery in such circumstances \* \* \*." It was consistent with these aims of Section 26(b) for Congress to provide—as it specifically did—for the election among the several remedies to be in the hands of the Government. Certainly, the Government is in the best position, in view of its familiarity with the administration of the Act and the handling of Government property, to select the specific remedy needed in a particular situation to protect the objectives of the Act and to make itself whole.

The court of appeals, however, stated (R. 457) that the Section 26(b)(1) remedy selected by the district court is more appropriate than the Section

<sup>9</sup>The objectives are fully spelled out in Section 2 of the Surplus Property Act of 1944, 58 Stat. 766, 50 U.S.C. App. (1946 ed.) 1611.

26(b)(2) remedy selected by the Government when applied to the facts involved here. All of the elements of the fraud, the consideration agreed upon for the property, the agreement to pay, and the payment, were proved at the trial by the Government (see the Statement, *supra*, p. 6; R. 173-174, 237, 241, 244-253). The court of appeals' reasoning as to the inapplicability of Section 26(b)(2) to these facts is that its remedy "seems much more apposite to a contract where the property has not passed but a consideration has been agreed upon" (R. 457). But this limitation cannot possibly be squared with the language of the Act. There is no real doubt that the Section 26(b)(2) remedy of twice the agreed consideration plainly applies to fully executed transactions. *Solomon v. United States*, 276 F. 2d 669 (C.A. 6), pending on petition for certiorari, No. 133, this Term; *United States v. Bernstein*, 149 F. Supp. 568 (D. Colo.), reversed on other grounds, 256 F. 2d 697 (C.A. 10).<sup>10</sup>

<sup>10</sup> Respondents have argued that the Section 26(b)(2) remedy is inapplicable as a matter of law, because it cannot apply to executed transactions. They do not, and cannot, assert that the remedy is unreasonable because the amount involved exceeds any potential damage to the Government's interest. It would clearly have been appropriate for the district court to assess forfeitures on the number of separate purchases made by respondents, or on the number of items of property purchased by them. See *United States v. Rubin*, 243 F. 2d 900 (C.A. 7); *Daniel v. United States*, 234 F. 2d 102 (C.A. 5). This would have established a forfeiture range between \$72,000 and \$298,000 (see *supra*, p. 7, note 9). A recovery of \$159,025.32 under Section 26(b)(2), which represents twice the consideration sought by the Government, is within this range. The unusually low recovery of \$8,000 awarded by the district court would permit these respondents to spread the burden

The court below also suggested (R. 457) that recovery under Section 26(b)(1) is more appropriate than recovery under Section 26(b)(2) because of the fact that the Government proved no actual damages. Since there is no requirement for such proof under Section 26(b)(2), the availability of proof of actual damages is completely irrelevant to imposition of that remedy. Thus, there is no supporting statutory language or legislative history for any of the suggestions advanced by the court below in order to justify its rejection of the Section 26(b)(2) remedy.

## II

THIS CASE HAS NOT BEEN MOOTED BY THE ACCEPTANCE BY THE UNITED STATES OF PROMISSORY NOTES IN PAYMENT OF THE LESSER AMOUNT AWARDED BY THE DISTRICT COURT

The Government's position in the court below and here is that the district court erred in awarding it only \$8,000 under Section 26(b)(1) and that it was entitled to a damage award of \$159,025.32 under Section 26(b)(2). Respondents now suggest that this case is moot because the Government has accepted promissory notes in payment of the \$8,000 concededly due, and that the United States "should be estopped from further pressing its demands in this proceeding." Respondents' Reply to Petition for a Writ of Certiorari, pp. 11-13.

of their fraud "progressively thinner over projects each of which individually increased their profit," a result which, as this Court stated, Congress did not intend under the False Claims Act's provision which is similar to that found in Section 26(b)(1) of the Surplus Property Act. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 552.

The \$8,000 judgment, while affirmed on appeal and challenged here by the United States on the ground that it is inadequate, was not challenged in this Court by respondents. Thus, as to them, it is binding and there can be no question that the Government could have sought execution on the \$8,000 judgment had respondents not arranged to pay it or filed a supersedeas bond. Moreover, the acceptance of the promissory notes by the Government enabled respondents to obtain a release of the judgment liens against them with respect to the \$8,000 judgment.

In these circumstances, respondents' contention of mootness is frivolous. The rule has been long established that a plaintiff who seeks a money judgment but obtains only a smaller judgment than that sought is not precluded from appealing merely because he has accepted payment of the smaller judgment. In *Embry v. Palmer*, 107 U.S. 3, 8, this Court completely rejected the contention that a plaintiff in error is estopped from prosecuting his appeal because he has accepted payment of a smaller amount:

\* \* \* The amount awarded, paid, and accepted constitutes no part of what is in controversy. Its acceptance by the plaintiff in error cannot be construed into an admission that the decree he seeks to reverse is not erroneous; nor does it take from the defendants in error anything, on the reversal of the decree, to which they would otherwise be entitled; for they cannot deny that this sum, at least, is due and payable from them to him. \* \* \*

Again in *Erwin v. Lowry*, 7 How. 172, 184, the Court declared that "in no instance within our knowledge

has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights." Accord: *United States v. Dashiell*, 3 Wall. 688, 701-702; *Luther v. United States*, 225 F. 2d 495 (C.A. 10); *Automobile Ins. Co. v. Barnes-Manley*, 168 F. 2d 381, 386 (C.A. 10); see also *Reynes v. Dumont*, 130 U.S. 354, 394; *Worthington v. Beeman*, 91 Fed. 232, 234 (C.A. 7); *Snow v. Hazlewood*, 179 Fed. 182, 184 (C.A. 5); *Carson Lumber Co. v. Saint Louis & San Francisco Railroad Co.*, 209 Fed. 191, 193-194 (C.A. 8); *Peck v. Richter*, 217 Fed. 880, 881 (C.A. 8); *Walters v. Fulton*, 14 F. 2d 107 (C.A. 9); *Armstrong v. Lone Star Refining Co.*, 20 F. 2d 625, 626 (C.A. 8); *Mudd v. Perry*, 25 F. 2d 85, 86 (C.A. 8); *Fifth Avenue Bank of New York v. Hammond Realty Co.*, 130 F. 2d 993, 994 (C.A. 7), certiorari denied *sub nom. McHie v. Fifth Avenue Bank, Executor*, 318 U.S. 765. As the acceptance of the \$8,000 by the United States does not prevent the United States from continuing to claim that the judgment below is erroneous and that \$151,025.32 is still owing (\$159,025.32 less \$8,000), the case obviously still presents a real controversy and is not moot.

Since the United States is entitled to \$8,000 in any event, and the only question left in the case is whether the judgment to which it is entitled should be even larger, there can be no possible prejudice to respondents resulting from their having paid the smaller

amount they concededly owe the United States. *Lanier v. Nash*, 122 U.S. 637. If the United States should not prevail in this court, respondents have paid only what they owed. If this Court reverses the decision of the court of appeals so that the United States obtains judgment for a larger amount, the amount already paid by respondents will be applicable as a credit toward payment of the larger judgment. *Erwin v. Lowry*, *supra*, 7 How. at 184.

#### CONCLUSION

For the foregoing reasons, we submit that the decision of the court below should be reversed and remanded with instructions to the district court to enter judgment for the United States in the amount of \$159,025.32 with interest and costs.

J. LEE RANKIN,

*Solicitor General.*

GEORGE COCHRAN DOUB,

*Assistant Attorney General.*

MORTON HOLLANDER,

ANTHONY L. MONDELLO,

*Attorneys.*

AUGUST 1960.

FILE COPY

Office-Supreme Court, U.S.

FILED

OCT. 8 1960

JAMES R. BROWNING, Clerk

# In the Supreme Court

OF THE

United States

OCTOBER TERM, 1960

No. 24

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E.  
SCHWARTZE and HARLAN L. MCFARLAND,

*Respondents.*

RESPONDENTS' BRIEF ON WRIT OF CERTIORARI

W. E. JAMES,

CONRON, HEARD & JAMES,

Suite 7, Habersfelde Building,

Bakersfield, California,

*Attorneys for Respondents.*

## Subject Index

|  | Page |
|--|------|
| Opinions below .....   | 1    |
| Jurisdiction .....   | 1    |
| Questions presented .....  | 2    |
| Statutes involved .....  | 2    |
| Statement .....  | 3    |
| Summary of argument .....  | 7    |
| Argument .....   | 8    |
| Point 1: The different measures of relief contained in the Statute are not necessarily alternative, but are for the purpose of affording a remedy for varied factual situations, and the measure of relief must be appropriate to the facts of the case .....                                    | 8    |
| Point 2: The Government seeks a construction of the Statute inconsistent with its language, its objectives, and contrary to its spirit and purpose .....   | 12   |
| Point 3: The Government elected its form of remedy by filing its Original Complaint, and re-elected by filing its Second Amended Complaint after the Court granted its motion to file the Second Amended Complaint and to withdraw its motion to file the proposed First Amended Complaint ..... | 21   |
| Point 4: After the case was at issue, the Government could only change its form of relief by permission of Court upon a showing that no prejudice would result and that the ends of justice would be furthered, which it failed to do .....  | 24   |
| Point 5: By proceeding to judgment on the Second Amended Complaint, the Government waived any further right to change its form of remedy .....   | 27   |
| Point 6: By accepting the notes and their payment, the Government has been awarded full relief in the form prescribed by the Statute .....   | 27   |
| Point 7: The record of the proceedings before the trial Court would not under any circumstances justify the Supreme Court in remanding the District Court decision with instructions to enter judgment for damages under Section 26(b) (2) of the Surplus Property Act ...                       | 29   |
| Conclusion .....   | 30   |

## Table of Authorities Cited

| Cases   | Pages      |
|---|------------|
| Bernstein v. U. S. (C.A. 10) 256 F. 2d 697 .....  | 17, 18, 19 |
| F. N. B. Birmingham v. U. S., 117 Fed. 486 .....  | 11         |
| Embry v. Palmer, 107 U.S. 3 .....   | 27         |
| Erwin v. Lowry, 7 How. 172 .....  | 27         |
| Gins v. Mauser Plumbing Co., 148 Fed. 2d 974 .....  | 12         |
| Hecht v. Alfaro, 10 Fed. 2d 464 .....   | 26         |
| Herrin Motor Lines v. Jarvis, (C.C.A. Miss. 1946), 156 F.<br>2d 276 .....                                   | 22         |
| McMahan v. McMahon, 122 S.C. 336, 415 S.E. 293 .....  | 28         |
| Minneapolis Nat'l Bank of Minneapolis, Kansas v. Liberty<br>Nat'l Bank of Kansas City, 72 Fed. 2d 434 ..... | 22         |
| N.Y. & T. Land Co. v. Gulf W.T. & P.R. Co., 100 Fed. 830<br>41 C.C.A. 87 .....                              | 26         |
| Nester v. Western Union Telegraph Co., 25 Fed. Supp. 478 .....  | 12         |
| Rex Trailer Company v. United States, 350 U.S. 148 .....  | 11, 24     |
| Rex T. Sadler v. U. S., 100 Law. Ed. 160 .....  | 11         |
| Soloman v. United States, 276 F. 2d 669 .....   | 15, 19     |
| Union Wire Rope Corp. v. A.T. & S.F. Rwy., 66 Fed. 2d<br>905 .....  | 26         |
| United States v. Bernstein, 149 Fed. Supp. 568 .....  | 6, 9, 12   |
| United States v. A. H. Fischer Lumber Co. (C.C.A.S.C. 1947),<br>162 F. 2d 872 .....                         | 22         |
| United States v. Grannis, 172 Fed. 2d 507 .....   | 11         |
| United States v. Hess, 87 Law. Ed. 443 .....  | 11         |
| United States v. Oregon Lumber, 260 U.S. 290, 67 Law Ed.<br>261, 43 Supreme Court 100 .....                 | 22         |
| United States v. Rubin, 243 Fed. 2d 900 .....   | 11, 24     |
| United States v. Rohleacher, 157 Fed. Supp. 126 .....   | 11         |
| Wittmayer v. U. S., (C.C.A. Mont. 1941), 118 F. 2d 808 ...  | 22         |

# TABLE OF AUTHORITIES CITED

iii

## Statutes

| Surplus Property Act:                       | Pages                                    |
|---|--|
| Section 23A .....                           | 9  |
| Sections 26 .....                           | 2, 9, 16, 37                             |
| Section 26(b) (1) .....                     | 3, 4, 6, 23, 24, 28                      |
| Section 26(b) (2) .....                     | 6, 8, 15, 18, 19, 20, 23, 24, 25, 29, 30 |
| Section 26(b) (3) .....                     | 10, 18                                   |
| Section 26(c) .....                         | 22                                       |
| Regulations, Section 8302.8, Sub. (d) ..... | 10                                       |
| 18 U.S.C.A., Section 2387 .....             | 2  |
| 28 U.S.C.A., Section 2462 .....             | 2  |

## Rules

|                                    |       |
|------------------------------------|-------|
| 11 F.R. 10035, 11136 .....         | 17    |
| 12 F.R. 1, Proclamation 2714 ..... | 3     |
| F.R.C.P. 15(a) .....               | 4, 22 |

## Texts

|  |    |
|--|----|
| 50 Am. Jur.:                             |    |
| Page 283 .....                           | 13 |
| Page 293 .....                           | 14 |
| Page 362 .....                           | 12 |
| Page 363 .....                           | 12 |
| Page 365 .....                           | 12 |
| Page 432 .....                           | 15 |
| 4 C.J.S.:                                |    |
| Page 622 .....                           | 27 |
| Page 623 .....                           | 27 |
| Moore, Federal Practice, Volume II:      |    |
| Section 8.14 .....                       | 12 |
| Moore, Federal Practice, Second Edition: |    |
| Volume 5, page 1903 .....                | 26 |
| Volume 7, page 3127 .....                | 28 |

## Miscellaneous

|   |        |
|---|--------|
| House Report No. 7454, page 920 .....                     | 20     |
| Senate Report 1142, 79th Congress, Section Session .....  | 15, 17 |
| Senate Report 10057, 78th Congress, pages 13 and 14 ..... | 9      |

# In the Supreme Court

OF THE  
United States

OCTOBER TERM, 1960

No. 24

UNITED STATES OF AMERICA,

*Petitioner;*

VS.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E.

SCHWARTZ and HARLAN L. MCFARLAND,

*Respondents.*

## RESPONDENTS' BRIEF ON WRIT OF CERTIORARI

### OPINIONS BELOW

Opinions below are correctly stated in Government's Brief.

### JURISDICTION

Jurisdiction is correctly stated in Government's Brief.

### QUESTIONS PRESENTED

1. Respondents challenge the Government's contention that Question No. 1 suggested is properly before this Court upon the record.

2. Respondents contend that the Government has made its own election.

3. Respondents contend that the Government has waived the right to change its election.

4. Respondents contend that by accepting one form of relief afforded by the Act, the Government is precluded by the Act from pursuing other measures of damage.

### STATUTES INVOLVED

Section 26 of the Surplus Property Act is stated in the Government's Brief.

28 U.S.C.A., Section 2462, states:

"Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon. June 25, 1948, c. 646, 62 Stat. 974."

U.S.C.A. Title 18, Sec. 2387, provides:

"When the United States is at war the running of any statute of limitations applicable to any offense committed in connection with the disposi-

tion of any real or personal property of the United States . . . shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent Resolution of Congress."

Proclamation 2714 12-PR-1 states:

"... Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946....

Harry S. Truman

By the President: James F. Byrnes  
The Secretary of State"

### STATEMENT

The original Complaint was filed as suggested by the Government, seeking damages against Respondents under the remedy of damages provided for by Section 26(b)(1) of the Surplus Property Act. (Tr. 323) The Complaint alleged that the fraud consisted of statements made by the veterans to the effect that the property was purchased for personal use. Interrogatories developed the fact that no such statements were made, and a Motion for Summary Judgment and to dismiss the original Complaint was presented to the Court. (Tr. 49.) To meet this defect in proof, the Government presented a First Amended Complaint, which differed from the original Complaint in two vital particulars: (1) It changed the allegation of

fraud in representing that the articles were purchased for personal use only to a totally different allegation that the veterans represented themselves to be engaged in an enterprise in which they owned more than 50% of the capital or were entitled to more than 50% of the profit; and (2) It changed the prayer by withdrawing its claim of \$2,000 per act and claimed in lieu thereof twice the consideration paid. (Tr. 25 to 43.) The motion to file this Complaint was not denied, as asserted in the Government's statement on page 5, but was voluntarily withdrawn by the Government and never presented to the Court for a ruling. In lieu thereof, on December 21, 1956, the Plaintiff moved under Rule 15A for permission to file a Second Amended Complaint, and in that motion Plaintiff "withdrew its motion to file First Amended Complaint". (Tr. 48.) Such motion was taken under submission by the Court, along with the Defendant's motions to dismiss and for summary judgment. On January 18, 1957, the Court made its written order granting the Plaintiff's motion to file the Second Amended Complaint and to withdraw the proposed First Amended Complaint. (Tr. 54-55.) The Second Amended Complaint contained the same allegation of fraud that was embodied in the First Amended Complaint, and contained the original prayer for relief, measuring its damages by Section 26(b)(1).

The pre-trial conference order does contain the statement made on page 5 of the Government's Brief, but such statement is an incorrect summation of the record, for, as above stated, the Government attorneys

made a substitute motion to file the Second Amended Complaint and coupled such motion with a voluntary withdrawal of the motion to file the First Amended Complaint, and the sole order made by the Court with respect to the motions to file amended complaints was the order made on January 18, 1957, which is quoted as follows:

"The motion of the plaintiff to file the Second Amended Complaint and to withdraw the First Amended Complaint is granted. The defendants are granted twenty days from the date hereof in which to file their answer" (Tr. 54.)

The Government thereafter on January 31, 1957, pursuant to the Court's ruling on its motion, filed its Second Amended Complaint; the Defendants filed their answer to the Second Amended Complaint on March 6, 1957; and the Government did not make any subsequent motion to further amend its complaint.

The Pre-trial Conference Order does contain the statement referred to and quoted on page 5 of the Government's Brief. However, as hereinbefore explained, such statement is not a correct summation of the record because the Court never ruled on any request of the Government to file an Amended Complaint other than its motion to file the Second Amended Complaint, which was granted. Paragraph VIIB of the Pre-trial Conference Order was inserted in such order by the Plaintiff's attorneys.

Paragraph III of the Conclusions of Law likewise erroneously states that the Court had ruled, in considering the Plaintiff's motion to file its First

Amended Complaint, that because the Government had elected to proceed under the provisions of Section 26(b)(1) it had made an irrevocable election and could not thereafter elect to receive damages under the provisions of Section 26(b)(2) as prayed for in the First Amended Complaint. (Tr. 116.) The Court never made any such ruling because, as hereinbefore stated, the Government voluntarily withdrew its motion to file the First Amended Complaint and coupled such withdrawal with a motion to file the Second Amended Complaint, which was granted. The point was not raised at the trial and the Court had nothing before it at the time of the trial with respect to which to make a ruling thereon. The Findings of Fact, Conclusions of Law and Judgment were prepared by the Government attorneys at the request of the Court, and by way of an understatement, do not correctly summarize the record.<sup>1</sup>

The Government elected to proceed to trial on the Second Amended Complaint and never attempted by motion or otherwise to make a different election (other than by its motion to file the First Amended Complaint which was voluntarily withdrawn) until after Judgment, when the Government on appeal raised the point as a contention.

<sup>1</sup>Hindsight is better than foresight. Though not apparent to Respondents at the time, it is now obvious that the Government, after waiving the point, changed its mind and decided to endeavor to lay a foundation to use this case and *United States v. Bernstein* as a means of getting expressions upon the point by different Circuit Courts, in order to get to this Court, on certiorari. There is no objection to this procedure so long as it is undertaken in a proper manner, which is not the case here.

After trial, both parties appealed (Tr. 21, 22); and while the appeals were pending the Government accepted notes from Defendants totalling \$8,000 plus costs, accepted monies on account of the notes, before the Opinion of the Circuit Court was rendered, and the notes have since been completely retired. (Reply to Petition for a Writ of Certiorari, pages 11 to 14.)

### **SUMMARY OF ARGUMENT**

Respondents contend:

1. The different measures of relief contained in the Statute are not necessarily alternative, but are for the purpose of affording a remedy for varied factual situations, and the measure of relief must be appropriate to the facts of the case.
2. The Government seeks a construction of the Statute inconsistent with the clear objectives of the Act, contrary to its spirit and purpose, and contrary to its express language.
3. The Government elected its form of remedy by filing its original Complaint, and re-elected by filing its Second Amended Complaint after the Court granted its motion to file the Second Amended Complaint and to withdraw its motion to file the proposed First Amended Complaint.
4. After the case was at issue, the Government could only change its form of relief by permission of Court upon a showing that no prejudice would result

and that the ends of justice would be furthered, which it failed to do.

5. By proceeding to judgment on the Second Amended Complaint, the Government waived any further right to change its form of remedy.

6. By accepting the notes and their payment, the Government has been awarded full relief in the form prescribed by the Statute.

7. The record of the proceedings before the trial court would not under any circumstances justify the supreme court in remanding the district court decision with instructions to enter judgment for damages under Section 26(b)(2) of the Surplus Property Act.

---

### ARGUMENT

**POINT 1: THE DIFFERENT MEASURES OF RELIEF CONTAINED IN THE STATUTE ARE NOT NECESSARILY ALTERNATIVE BUT ARE FOR THE PURPOSE OF AFFORDING A REMEDY FOR VARIED FACTUAL SITUATIONS, AND THE MEASURE OF RELIEF MUST BE APPROPRIATE TO THE FACTS OF THE CASE.**

We discuss this point because we assume that the Court, in granting Certiorari, assumed that the question was properly before the Court. We do not admit this to be the fact and wish to make it clear that this discussion is in no way to be construed to be an admission that the question has been properly presented to this Court for review in this proceeding.

The contention of the Government that it has the unequivocal right to select one of three remedies

irrespective of the evidence, cannot be fairly supported by the language of the Act. The language of the Act, fairly read, requires that the remedy be appropriate to the occasion, and for this reason it provides for alternatives. In the event that the fraud involved was not monetary in nature, the appropriate remedy would be \$2,000 for the act. If the fraud involved a contract where monies were agreed to be given in some stage of the transaction, such as in an executory contract or a price fixed by a bid, then the remedy appropriate to the occasion would be twice the consideration agreed to be given.<sup>2</sup>

Or if the property were available, the appropriate remedy could be the return of the property, in case it was under-priced by reason of the fraud or in case the defendant should be insolvent. Conceivably, situations could occur were more than one of the remedies would be considered appropriate. Unquestionably in such situations the Government should be entitled to

<sup>2</sup>Senate Report No. 10057, 78th Congress, discusses Section 23A of the Act then before the Senate on pages 13 and 14 of the Report. It discusses the penalty and fraud provisions of the Act finally adopted in Section 26 of the Surplus-Property Act. It uses this language: "The United States is given the option of electing among three *different* measures of damages." On page 11 of the Report, the subject "conditional sales" is discussed, thus indicating that the Government contemplated that executory contracts would be extensively used in its disposal program, and which makes the second of the different measures of damages, "the United States may recover from such person twice the consideration which he agreed to give to it", an appropriate remedy to the occasion. Nowhere in the discussion is the word "alternative" remedy used.

Prices of surplus property are also extensively fixed by calling for bids, as in *Bernstein*, Tr. 237.

make the selection. It would normally be made at the time of the filing of the Complaint, but could be made subsequently by leave of Court upon a showing that the ends of justice required the amendment and that no prejudice would result.

In the instant case, the second alternative is not appropriate because of the nature of the transaction. The transaction here involved did not involve any contract or agreement wherein "monies were agreed to be given or a price fixed by a bid." Here, the Government has set its own price and been paid in full in spot cash transactions which never were executory and never involved monies agreed to be given. (Tr. 238, 239; Ex. 6, Ex. 4; Tr. 241.)

The statute itself makes this distinction in 26(b)(3), which allows the Government to "retain as liquidated damages any consideration given".

The Surplus Act provides for sales upon executory contracts in Sec. 8302.8, Sub. (d) of Regulations issued thereunder.

The Appellate Court followed this reasoning when it stated: "There was only one statutory remedy, as Defendants claim. The amount of recovery prayed for had no effect upon the substance of the claim. If a cause of action was stated, based upon the statute, the amount of the recovery would be based upon the proof"; and "If these words (if the United States shall so elect) mean that the Government is entitled to the particular form of relief it chooses, willy-nilly, regardless of the evidence, and that the Court can

award that form and no other, unquestionably the proviso constitutes a criminal penalty, and the Courts which have construed these clauses as providing liquidated damages are wrong"; and, "The Trial Court unquestionably believed that twice the consideration agreed to be paid was not applicable here".<sup>3</sup>

There is nothing new or startling in the Court's reasoning. It has always been the province of the Court to determine the character and breadth of the trick or device involved, in the light of reason, and the evidence.

*U. S. v. Hess*, 87 Law. Ed. 443;

*U. S. v. Rohleacher*, 157 Fed. Supp. 126;

*U. S. v. Grannis*, 172 Fed. 2d 507;

*E. N. B. Birmingham v. U. S.*, 117 Fed. 486;

*Rex T. Sadler v. U. S.*, 100 Law. Ed. 160;

*U. S. v. Rubin*, 243 Fed. 2d 900.

<sup>3</sup>The Government is, in effect, arguing that the Court should have no voice whatever in the selection of the remedy after the filing of the Complaint, or in the determination of the reasonableness of the damage, and is seeking a maximum monetary recovery regardless of the equities, and damages, or lack thereof, suffered by the Government.

It would regulate the Court at a surplus trial to the position of a mere chairman of the proceeding and strip it of all discretionary power. This approach is contrary to the spirit of the Act, which gives the Court "full power and jurisdiction to hear, try, and determine such suit", and it is contrary to the basic concept of liquidated damages which, as stated in *Rex Trailer Company v. United States*, 350 U.S. 148, must be reasonable:—"liquidated damages, when reasonable, are not to be regarded as penalties"; and, "On this record it cannot be said that the measure of recovery is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty". The Court below noted this situation by stating, "if the Government is entitled to the particular form of relief it chooses, willy-nilly, unquestionably the proviso constitutes a criminal penalty".

And since the advent of the New Federal Rules, the prayer becomes unimportant and relief is measured by the evidence.

II Moore, Fed. Practice, § 8.14;

*Nester v. Western Union Telegraph Co.*, 25 Fed. Supp. 478;

*Gins v. Mauser Plumbing Co.*, 148 Fed. 2d 974;  
*U. S. v. Bernstein*, 149 Fed. Supp. 568.

**POINT 2: THE GOVERNMENT SEEKS A CONSTRUCTION OF THE STATUTE INCONSISTENT WITH ITS LANGUAGE, ITS OBJECTIVES, AND CONTRARY TO ITS SPIRIT AND PURPOSE.**

50 Am. Jur. 365.

A construction that would make part of a statute superfluous is to be avoided. Each portion of the statute must be given a meaning.

50 Am. Jur. 363.

A construction is favored which will make every word operative rather than one which makes some words idle.

50 Am. Jur. 362.

Significance should be given to every word in a statute.

The Government ignores "agreed to be" and treats the statute as if it read "*monies paid*". Under the above quoted rule of construction, it may not do this. The Government also ignores the fact that the Act distinguishes between "agreed to be given" and "paid".

The Government does not seek an interpretation of the Act consistent with its objectives which appear in its legislative history and in its expressed intent.

50 Am. Jur., page 283, states:

"The purpose for which a statute is enacted is of primary importance in the interpretation thereof.

... In any event, in the interpretation of a statute of doubtful meaning, it is proper to take into consideration its purpose or object, or the aim, design, motive, or end in view, or the aspirations intended to be efficiently embodied in the enactment."

The principal object, aim or design of the Surplus Property Act is to provide an effective method of disposing of war surplus property. Incidental to this broad objective, it endeavors to accomplish that result in a manner that will aid veterans to re-establish themselves in civil life; and also incidental to the purpose, it endeavors to provide an orderly means of putting the surplus property into normal channels of trade consistent with the protection of free enterprise. The damage provisions of the Act are designed only to provide a means of affording reasonable compensation to the Government for the damage which it may sustain by reason of any fraudulent trick, scheme or device. The Act has penal provisions designed to discourage fraudulent practices.

The legislative history of the Act notes that the Sections are designed to give the Government different measures of damages appropriate to the occasion (Footnote 2; supra). The contention of the Govern-

ment goes far beyond the aims and objects of the Surplus Property Act as disclosed in the Act itself, and in the legislative history of the Act, and seeks a construction which has no reasonable relation to the ends and objects of the Act itself, but, instead, goes far beyond and affords the Government a maximum recovery in every case, even though such a construction ignores the distinction between "consideration agreed to be given" and "consideration given". It allows the Government to recover a sum which has no relation whatsoever to the damage, if any, sustained by the Government, and which is so severe that it would have a deterrent effect upon the whole surplus disposal program.

This is tantamount to using the Statute as a means of replenishing the Treasury, irrespective of any damage suffered, a purpose which was not set forth in the objectives provided in the Statute or in the legislative history or in the clear language of the Act itself.

50 Am. Jur., page 293, states:

"It is also a general rule that a statute should not be extended by construction beyond the correction of the evils sought by it...."

To allow an interpretation of the Act to provide alternative remedies, irrespective of the evidence, is to take from the Court its inherent right to require the facts to meet the occasion and to require the application of the laws to be reasonable. Under the theory advanced by the Government, a fraud very insignificant and not monetary in nature which would do no

damage of any significance to the Government could permeate a transaction involving huge expenditures and thus result in a triple recovery to the Government; a result which in no way could be said to be a recovery of compensatory or liquidated damages. It could constitute punishment more severe than criminal penalties—a result not within the spirit of the Act or the intent of the legislature.

The statute should be construed to avoid this possibility. 50 Am. Jur. 432.

The application of Section 26(b)(2) to the facts of this case would be so harsh and unreasonable as to constitute a penalty, which would distinguish the cases of *U. S. v. Doman* and *Koller v. U. S.*, and bring into play the statute of limitations, for the original Complaint was filed one day too late, and the Second Amended Complaint, being different in substance, was filed over a year too late.<sup>4</sup>

The argument that the express language of the Act gives the Government the option of electing from alternative rather than appropriate remedies is not bolstered by Senate Report 1142, 79th Congress, Second Session, which discusses "different" measures of damage, not "alternative" measures. So far as Con-

<sup>4</sup>Opening Brief, Court of Appeals, pages 7 to 12. *Soloman v. U. S.* holds that 26(b)(2) is not penal, as applied to the facts of that case; but neither *Soloman*, *Koller* or *Doman* discuss the rule that under certain circumstances a measure would be fair and reasonable, and under other circumstances the same measure would be so harsh and unreasonable as to be "penal", irrespective of the language used.

gressional intent is expressed in the Report, it is more consistent with Respondents' view than with the Government's.

The argument that the policy of the War Surplus Act gives the Government the option of electing from alternative rather than appropriate remedies is likewise not convincing, for Respondents' construction of the Act is more consistent with the policy as expressed in the Surplus Property Act than the construction urged by the Government. The Government looks only to Section 26 and not to the whole Act to determine the policy. The underlying policy of the Surplus Property Act is to provide a ready means of disposing of surplus property. Section 26 is not the objective of the Act, but merely one part thereof, inserted to provide the Government a means of recovering reasonable damages which it may suffer by reason of the fraudulent acquisition of surplus property. Respondents' construction adequately protects the Government from sales to those to whom it would not be willing to sell and at prices it would not be willing to receive, or from having property channelled away from those otherwise entitled to a priority.

The Government's argument overlooks the fact that the principal purpose of the Surplus Act is thwarted rather than furthered by its requested construction, because it goes beyond the province of reasonable damage which the Act is designed to afford the Government, and applies a measure so drastic as to discourage all purchasers of Government surplus property and thus defeat the basic objective of the Act.

It is further noted that many of the elements of the Government's policy argument in respect to the severeness of the damage and the difficulty of providing an adequate means of recovery were not in the law at the time the great majority of the transactions here involved took place.<sup>5</sup>

The fact that no litigant has in the preceding 15 years challenged the right of the United States to select among the statute's three remedies is neither helpful nor harmful. If anything, it would indicate that the Government, during that period, had made its election at the time of filing its Complaint and consistently abided by the election thereafter.

The question of when and how the election is to be made has never been discussed in any reported surplus case with the exception of *Bernstein v. U. S.*, 256 F. 2d 697 (C.A. 10). That case is distinguishable

<sup>5</sup>Senate Report, 1142, 79th Congress, Second Session, brings into sharp focus the fact that the original Act did not give the veteran a sufficiently high priority, and proposed that his preference be advanced from sixth position to one second only to the Federal Government. This Committee Report was dated March 5, 1946, and the transactions here involved occurred between March and July, 1946, only a few in September. The amendment considered in the Senate Report did not become law until May 3, 1946, and regulations thereunder restricting the right of the veteran to purchase for resale unless he owned 50% of the enterprise or was entitled to 50% of the profit, and regulations discouraging "brokering" were not enforced until November 6, 1946. 11 F.R. 10035, 11136. Tr. 426, 427.

This distinguishes the argument of the Government and the effectiveness of *Bernstein* as a parallel to this case, for *Bernstein* involved the amended Act and regulations. The instant case involved the original regulations under which the veteran had a low priority. The sales to the general public of the surplus equipment here involved were advertised in the same catalogue and at the same prices, subject only to a limited period of bidding preference to the veteran. Tr. 241-245.

from the case at bar in several vital particulars, in addition to that discussed in Footnote 5. There, the Government initially filed, measuring its damages under the provisions of Section 26(b)(2) of the Surplus Act. Five years later, it sought to amend its Complaint through proper procedure to change its remedy from 26(b)(2) to the common law remedy of recovering the proceeds of the sale of the property (not the recovery of the property, authorized by 26(b)(3)); and defendants answered, claiming an election of remedy was made at the time of filing the Complaint. The trial court, stating that the ends of justice would not be served and that prejudice resulted from the change in the remedy, upheld the defense of election and denied the Government the right to trace the proceeds.

The appellate court reversed the trial court, stating that it disagreed with the Court's finding that prejudice would result or that the ends of justice would not be served, by allowing the alternative procedure of common law by recovering the proceeds of the sale of the property.

The case is not authority for the proposition that the Court has nothing to do with the election of remedies, or the proposition that the right to elect is in the Government exclusively.

The question of the right to elect in *Bernstein* was properly presented to the trial court in the first instance, which is not the case here. Furthermore, the discussion in *Bernstein* in regard to the doctrine of "election of remedies" related to the common law

doctrine which required a litigant, after choosing one of two inconsistent positions, to forego the other. The question of election of remedies, insofar as this case is concerned, has nothing whatsoever to do with the common law doctrine of election of remedies, but has to do with the interpretation of the War Surplus Act, which is a problem of construction and which has no bearing or relationship to the common law doctrine of election of remedies.

*Bernstein* is further vastly different from the instant case upon the facts, for there huge profits were involved, flowing apparently from the fact that the sale was underpriced in the first instance. The sale price was fixed on the basis of Bernstein's bids in the first instance. Here, the sale price was fixed by the Government and there was no contention that any speculative profit resulted.

Respondents have never contended that Section 26(b)(2) is limited to unexecuted transactions, but do contend that it applies only to transactions in which, at some point, a fraudulent scheme involved monies "agreed to be paid".

The facts of *Bernstein* do show that, in the preliminary negotiations, Bernstein made an offer or bid, and it was on this basis that the price was fixed to the Veterans. Moneys were therefore agreed to be paid.

*Soloman v. United States*, 276 F. 2d 669, involved an arrangement whereby the contract was at one stage executory. The Opinion states, "The Solomans paid to each veteran the amount of money which the veteran had agreed to pay for the steel".

Neither "Soloman" nor "Bernstein" discussed the problem of whether Section 26(b)(2) was applicable to the facts of the case; both decisions, without comment, assumed that the statute was applicable.

The policy of the War Surplus Act, namely, to prevent fraud, to make the Government whole and to carry out its surplus disposal program in an orderly manner, is furthered by Respondents' construction more effectively than by the Government's, for it is submitted that justice is better accomplished by applying a remedy appropriate to the facts of the case, rather than to allow a remedy having no relation to the specific transaction in question to be arbitrarily chosen by the Government without any Court supervision over the reasonableness of the case.<sup>6</sup>

---

<sup>6</sup>The hearings before the Sub-Committee of the Committee on Appropriations, United States Senate on H.R. 7454, page 920, discusses not only the magnitude of the Government's "Surplus problem", but the reasons for keeping it liquid, practical and operating. The reasons for the disposal problem were given:

1. Day-to-day operations caused military equipment to wear out.
2. Obsolescence takes great inroads on military hardware.
3. When equipment is replaced by a new and more effective product, the parts problem of the old article also becomes surplus whether new or used.
4. Retention of these articles results not only in a loss of their inherent value, but also creates storage, warehouse, accounting and bookkeeping problems.

The magnitude of the surplus problem, 8 to 10 billion a year in volume, as discussed by Mr. Riley, Director of Surplus Management Policy, indicates that unreasonably harsh penalties should not be inflicted to the extent that they will be an effective deterrent to dealing in surplus property by the general public.

**POINT 3: THE GOVERNMENT ELECTED ITS FORM OF REMEDY BY FILING ITS ORIGINAL COMPLAINT, AND RE-ELECTED BY FILING ITS SECOND AMENDED COMPLAINT AFTER THE COURT GRANTED ITS MOTION TO FILE THE SECOND AMENDED COMPLAINT AND TO WITHDRAW ITS MOTION TO FILE THE PROPOSED FIRST AMENDED COMPLAINT.**

The Government's contention is that the right to make the election rests in the executive branch of the Government and not in the trial court. We do not dispute the Government's right in this regard. We admit that in the first instance the power and right to make the election of which of the three remedies is to be used lies in the Government to the extent that the evidence upon which it relies to establish its case makes the remedy appropriate.

The right and power of the Government to make the election is not unlike the right and power of any plaintiff in any case to make an election. The first election is whether or not to litigate. This involves a decision as to (a) whether a wrong has been committed for which there is legal redress; (b) whether there is evidence to prove that alleged cause of action; and (c) if the evidence will support alternative relief, the type of relief desired. Once these matters have been decided upon, the first step in the litigation is to prepare and file a complaint. It is at this point that the election of remedy is made in almost all types of litigation. When the Complaint is filed and the election is made, it is made in the manner most appropriate to the facts making the cause of action.

Thereafter, in any case, a litigant is privileged to change his election only after permission of the Court

having been first had and obtained upon a showing that the ends of justice require the amendment and that prejudice will not result thereby. *U. S. v. Oregon Lumber*, 260 U.S. 290, 67 Law. Ed. 261, 43 Supreme Court 100. *Minneapolis Nat'l Bank of Minneapolis*, *Kansas v. Liberty Nat'l Bank of Kansas City*, 72 Fed. 2d 434; *Herrin Motor Lines v. Jarvis*, C.C.A. Miss. 1946, 156 F. 2d 276; *Wittmayer v. G. S.*, C.C.A. Mont. 1941, 118 F. 2d 808; *U. S. v. A. H. Fischer Lumber Co.*, C.C.A.S.C. 1947, 162 F. 2d 872; F.R.C.P. 15(a).

The language of the Surplus Act affirmatively requires the Government to make an election if it seeks damages in a form other than \$2,000 per act. It does not authorize the Government to capriciously change its mind or to await the outcome of the proceeding for the purpose of determining which course to select. The Act says "elect"; not "elect twice"; not "reserve the right to elect".

Neither does the Act give to the Government, to the exclusion of the Courts, the unrestricted and unbridled arbitrary right to make the election at a time or in a manner of its choosing, for Section 26(c) of the Act provides: "The several District Courts of the United States . . . within whose jurisdictional limits the person or persons . . . resides or shall be found, shall have full power and jurisdiction to hear, try, and determine such suit". Conceding that the United States, at the outset, had the power to select the form of remedy which would be supported by the evidence at its command, there is no reason arising out of the language of the War Surplus Act, or otherwise, why the Gov-

ernment should not be subject to the usual rules of procedure applied by the Courts to all litigants, which would restrict the right of the Government to change its form of remedy after filing its Complaint to the extent that permission of the Court be had and obtained after a showing that no prejudice would result and that the ends of justice would be furthered by permitting the amendment. The Government made an election when it filed its original Complaint and thereafter made a re-election to recover the damages provided for in Section 26(b)(1) of the Surplus Property Act when it filed its Second Amended Complaint pursuant to the Order of the Court granting the motion to file such Complaint and to withdraw the motion to file the First Amended Complaints. The Government never thereafter sought to make any further election.

These respondents will suffer great prejudice if, after trying the case under one theory, the Government, after trial, is allowed to change its form of remedy from \$2,000 per act to twice the consideration paid. They tried this case on the theory that \$2,000 per act was the measure of damage selected, and certainly would not have waived a jury or foundation to the purchase invoices had twice the consideration paid been the object of the trial, or an alternative remedy that the Government could later select.

Three of the four applications were applied for before the amendment of the Surplus Act in 1946. Also, most of the transactions (about 80%, dollar-wise) took place before the amendment of the Act, and all transactions occurred before the regulations were changed re "brokering", and these distinctions would have to be made before the 26(b)(2) formula could be applied, if at all.

The Court evidently was of the opinion that the ends of justice would not be furthered by allowing the harsh remedy of 26(b)(2) in view of the facts of this case. Tr. 440, 441, 442, 443. Although it was argued unsuccessfully that the Court's finding of fraud was clearly erroneous, the evidence produced indicated

**POINT 4: AFTER THE CASE WAS AT ISSUE, THE GOVERNMENT COULD ONLY CHANGE ITS FORM OF RELIEF BY PERMISSION OF COURT UPON A SHOWING THAT NO PREJUDICE WOULD RESULT AND THAT THE ENDS OF JUSTICE WOULD BE FURTHERED, WHICH IT FAILED TO DO.**

The record shows that the Government voluntarily abandoned its attempt to change its election of remedy, and for this reason the question certified to this Court for further attention is not presented in the record. The attempt to change the form of remedy from that provided in Section 26(b)(1) to 26(b)(2) was presented to the Court by a Motion (Tr. 24) to permit the filing of a First Amended Complaint. (Tr. 25 to 43.) Before this Motion was ruled upon, the Government voluntarily withdrew the First Amended Complaint, abandoned the Motion to file the same, and offered for

that the fraud, if any, in these transactions was not severe and that no monetary damage resulted to the Government by reason of the transactions. First, the transactions never involved monies "agreed to be paid". Second, the Applications were signed at a time when the policy of the Government had not been sufficiently formulated to advise the defendants of the fact that their activity was wrongful. Three of the four applications were signed before the Surplus Act was amended to give the veteran a high priority, and all transactions were completed before the Government tightened its policy in regard to brokering. These were not transactions in which the veterans were picked out of thin air and used as a "tool". In one form or another, Hougham actively assisted these veterans in returning to peacetime activity, which was one of the major objectives of the Surplus Act. There was no monetary fraud involved, because the Government set its own price and received full payment in cash. There had been no previous criminal prosecution, such as had been the case in *R.R. Trailer, Doman, Marcus v. Hess*, and *Rubin*.

Undoubtedly these considerations were in the mind of the trial court at the time it selected the base for imposing forfeiture which was most appropriate to the occasion. The selection, however, was not made on the basis that it was the selection least "favorable" to the Government.

...filing a Second Amended Complaint which prayed for relief under Section 26(b)(1), and the Second Motion was granted. (Tr. 54 and 73.)

This action on the part of the Government was the outcome of argument upon the Motion for a Summary Judgment, wherein it was pointed out that the evidence which had been developed by interrogatories failed to support the allegation of the first Complaint to the effect that articles were purchased for personal use. The First Amended Complaint was then offered, and the objection was raised that the evidence also failed to support the cause of action which it attempted to allege, namely, a recovery of twice the consideration agreed to be paid, for the interrogatories also developed that in no part of any transaction was there any agreement to pay any sum at any time. All of the transactions were cash sales. The result was the Motion to withdraw the First Amended Complaint and to file the Second Amended Complaint, which cured the objectionable allegation of fraud in the first Complaint and the objectionable prayer for recovery contained in the First Amended Complaint, and the Motion was granted.

This occurred January 18, 1957. The Pre-Trial Order was not entered until September 3, 1957. (Tr. 105.) No attempt or request was made at the Pre-Trial hearing for permission to amend the pleading, which would have been proper under pre-trial procedure (Rule 16), but out of thin air the matter was inserted in the Pre-Trial Order and in the Findings of Fact (Tr. 116), without any ruling by the trial

court. Actually, the Court's decision was not upon that theory at all.<sup>8</sup>

The fact is, that the trial court never took the arbitrary stand that the filing of the first Complaint constituted an irrevocable election. The fact is, the Government voluntarily receded from its position that it was entitled at a later time, to change its election, and went to trial under a theory that would have, had it been supported by reasonable evidence, entitled it to some three hundred thousand odd dollars in damages, and after gambling and losing, the Government, for the first time, on appeal seeks to inject a new theory into the case.

*Hecht v. Alfaro*, 10 Fed. 2d 464; *Union Wire Rope Corp. v. A.T. & S.F. Rwy.*, 66 Fed. 2d 905; *N.Y. & T. Land Co. v. Gulf W.T. & P.R. Co.*, 100 Fed. 830, 41 C.C.A. 87; *Moore's Federal Practice*, Second Ed., Vol. 5, p. 1903.

---

<sup>8</sup>In summarizing its views in respect to the Judgment, the Court stated at the conclusion of the trial:

"Now, I have come to the conclusion in this case that the acts were the acts in connection with these applications.

"I gave some thought or consideration to maybe the transactions occurring on separate days might be a separate act, but it seems to me the genesis of the whole matter are these applications, so there were three separate applications, filed by each veteran, and then one veteran filed an additional application.

"I think that the recovery by the government should be limited to the four acts of the statutory amount, and it is my view that Mr. Hougham, I have already indicated, participated in those various acts.

"So the Court will order judgment in accordance with the views here expressed, and direct the government to prepare findings, conclusions, consistent with the remarks that I have made." Tr. 445.

**POINT 5: BY PROCEEDING TO JUDGMENT ON THE SECOND AMENDED COMPLAINT, THE GOVERNMENT WAIVED ANY FURTHER RIGHT TO CHANGE ITS FORM OF REMEDY.**

If the filing of the action did not constitute an election, the Plaintiff waived the right to change the form of action by filing the Second Amended Complaint and proceeding to judgment thereon.

4 C.J.S. 622 states:

"The subsequent amendment of a pleading usually waives the right to appeal from a judgment or order sustaining a demurrer to a former pleading, or from a ruling on a motion to strike or make more specific . . ."

And 4 C.J.S. 625 states:

"The right to appeal or bring error from an interlocutory order or decree will be regarded as waived where the party having such right voluntarily proceeds with, or participates in, subsequent steps in the trial, if this is inconsistent with the appeal or proceeding in error."

**POINT 6: BY ACCEPTING THE NOTES AND THEIR PAYMENT, THE GOVERNMENT HAS BEEN AWARDED FULL RELIEF IN THE FORM PRESCRIBED BY THE STATUTE.**

The Government suggests that Respondents claim that the point has become "moot". In a sense this is true, but our claim is broader than that. Our claim is that the Government has demanded and received the full award which the Court found it entitled to under the evidence. The case of *Embry v. Palmer*, 107 U.S. 3, and *Erwin v. Lowry*, 7 How. 172, and the

other cases mentioned on page 19 of the Government's Brief, are not in point, and do not bring the Government within the exception to the general rule that a party who accepts the benefit of a decree is estopped from contesting it. The exception under which it seeks refuge relates to a decree that is divisible and that part which is not contested is accepted. In the instant case, the entire decree was contested by both parties. No part of it was unchallenged. The notes were accepted and paid before the judgment became final. Here we have a situation where the Government has accepted the relief to which the Court found it entitled under Section 26(b)(1) of the Surplus Property Act which limits the Government's recovery to damages under one of the three sections. As the decree stated, the reason for the words "at the election of the Government" is to show the non-cumulative nature of the provisos.

By accepting \$2,000 per act, the Government is precluded from seeking relief under a different measure of damage.

As stated in *McMahan v. McMahon*, 122 S.C. 336 at 342, 115 S.E. 293 at 295:

"when a certain state of facts, under the law entitles a party to alternative remedies, both founded upon the identical state of facts, these remedies are not considered inconsistent remedies, though they may not be able to 'stand together'; the enforcement of the one remedy being a satisfaction of the party's claim."

Moore, Second Ed., Vol. 7, p. 3127.

POINT 7: THE RECORD OF THE PROCEEDINGS BEFORE THE TRIAL COURT WOULD NOT UNDER ANY CIRCUMSTANCES JUSTIFY THE SUPREME COURT IN REMANDING THE DISTRICT COURT DECISION WITH INSTRUCTIONS TO ENTER JUDGMENT FOR DAMAGES UNDER SECTION 26(b)(2) OF THE SURPLUS PROPERTY ACT.

Section 26(b)(2) provides that the recovery shall be a sum equal to twice the consideration agreed to be given by such person to the United States or to any Government agency. As hereinbefore pointed out by Respondents, the record contains no evidence or other proof of any agreement on the part of any of the Defendants to pay money to the Government. There were no executory contracts of any sort or nature involved in any of the complained of transactions. All of the transactions involved the cash purchase of equipment offered for sale by the Government at a fixed price. The reason why Government voluntarily withdrew its motion to file the first amended complaint (which prayed for damages under the provisions of Section 26(b)(2)) was because it appeared that the evidence developed by the interrogatories would not support a recovery of twice the consideration *agreed* to be paid because all of the transactions involved cash sales at a price fixed by the Government. Hence if this Court, for any reason or under any theory, should reverse the trial Court it cannot remand the decision to the District Court with instructions to enter judgment for damages as requested by the Government in its brief because of lack of evidence to support such a judgment. Also, as has been hereinbefore pointed out to this Honorable Court, the Government, by withdrawing its motion to file its pro-

posed First Amended Complaint and proceeding to trial, and judgment, on the Second Amended Complaint, which it elected to file in lieu of the proposed First Amended Complaint, caused the Defendants to waive a jury and to otherwise adopt trial tactics to conform with the relief prayed for by the Government in its Second Amended Complaint. Hence, even if there should be evidence in the record to support a judgment under Section 26(b)(2) [which there is not], it would be highly inequitable to remand the decision to the District Court with any instructions other than for a new trial on the voluntarily withdrawn proposed First Amended Complaint (and such a ruling by this Court would not be supported by the record of the trial court, for the District Court was not called upon to rule upon the withdrawn motion to file the proposed First Amended Complaint).

### CONCLUSION

The Surplus Property Act of 1944 as amended does not afford the Government alternative remedies, but different remedies to be used when supported by proper evidence and appropriate to the occasion. While the Government in the first instance has the right to make an election of which of the different forms of remedy is appropriate, its right is not absolute and is subject to the supervision of the Court to the extent that it be reasonable and appropriate to the occasion. The second alternative of Section 26 of the Surplus Property Act is not appropriate to the

facts of this case or reasonable in the light of the circumstances and transactions here involved, and the conclusion of the trial court to this effect is not clearly erroneous, is supported by substantial evidence, and should be affirmed. Furthermore, the Government, by voluntarily withdrawing its motion to file its proposed First Amended Complaint coupled with a motion to file its Second Amended Complaint, which was granted, and by thereafter proceeding to judgment on the Second Amended Complaint without attempting to make a further election, waived any right it may otherwise have had to make a further election of the alternate remedies provided for in Section 26 of the Surplus Property Act.

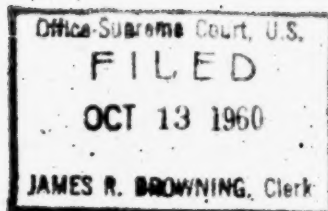
Respectfully submitted,

W. E. JAMES,

CONRON, HEARD & JAMES,

*Attorneys for Respondents.*

FILE COPY



No. 24

---

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E.  
SCHWARTZE AND HARLAN L. MCFARLAND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

J. LEE RANKIN,

*Solicitor General,*

GEORGE COCHRAN DOUB,

*Assistant Attorney General,*

WAYNE G. BARNETT,

*Assistant to the Solicitor General,*

MORTON HOLLANDER,

ANTHONY L. MONDELLO,

*Attorneys,*

*Department of Justice, Washington 25, D.C.*

---

## INDEX

### Argument:

|   | Page |
|---|------|
| I. The Government's election of double-consideration damages under § 26(b)(2) was made in the pretrial order and ruled on in the trial court's conclusions of law | 2    |
| II. Section 26(b)(2) is applicable by its terms to the transactions involved  | 6    |
| III. The trial court has no discretion to select as more "appropriate" a remedy other than that elected by the Government and did not purport to do so            | 9    |
| IV. The election of double-consideration damages was timely and did not prejudice respondents   | 13   |

## CITATIONS

### Cases:

|   |    |
|---|----|
| <i>Bernstein v. United States</i> , 256 F. 2d 697                                       | 13 |
| <i>Conley v. Gibson</i> , 355 U.S. 41   | 13 |
| <i>Friederichson v. Renard</i> , 247 U.S. 207   | 13 |
| <i>Hickman v. Taylor</i> , 329 U.S. 495   | 13 |
| <i>McMahan v. McMahon</i> , 122 S.C. 336  | 13 |
| <i>Rez Trailer Co. v. United States</i> , 350 U.S. 148                                  | 11 |
| <i>United States Fidelity &amp; Guaranty Co. v. First National Bank</i> , 172 F. 2d 258 | 13 |

### Statutes:

|  |   |
|--|---|
| Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C. App. (1946 ed.) 1611, <i>et seq.</i> |   |
| Section 26(b)(1)   | 2, 3, 6, 10, 13, 14                     |
| Section 26(b)(2)   | 1, 2, 3, 4, 5, 6, 9, 10, 12, 13, 14, 15 |

## Miscellaneous:

## Federal Rules of Civil Procedure:

|  | Page |
|--|------|
| Rule 15(a).....                                  | 14   |
| Rule 16.....                                     | 5    |
| 2 Moore, <i>Federal Practice</i> , §2.06(3)..... | 13   |

# In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 24

UNITED STATES OF AMERICA, PETITIONER

v.

E. B. HOEGHAM, OWEN DAILEY, WILLIAM E.  
SCHWARTZ AND HARLAN L. MCFARLAND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF FOR THE UNITED STATES

PLAINT

Respondents urge numerous grounds in support of the judgment below in addition to that on which the Court of appeals based its decision and to which our opening brief was primarily directed. Their argument on the merits,<sup>1</sup> as we understand it, resolves itself into four distinct contentions: (1) the Government failed properly to put in issue in the trial court its asserted right to double-consideration damages under § 26(b)(2) and the trial court accordingly never ruled on the question; (2) § 26(b)(2) is by its

<sup>1</sup> On the question of mootness, respondents' arguments are fully answered in our main brief (pp. 17-20) and no further comment is necessary here.

terms inapplicable to the transactions here because they did not involve executory "agreements"; (3) even if § 26(b)(2) is technically applicable, the trial court had a discretionary power to choose another remedy it deemed more "appropriate" (the ground of the court of appeals' decision); and (4) while the election of § 26(b)(1) damages in the original complaint was not "irrevocable" as a matter of law, a change of election should not be allowed here because it would be prejudicial to respondents. We will reply to the arguments in the order indicated.

# I

## THE GOVERNMENT'S ELECTION OF DOUBLE-CONSIDERATION DAMAGES UNDER § 26(b)(2) WAS MADE IN THE PRE-TRIAL ORDER AND RULED ON IN THE TRIAL COURT'S CONCLUSIONS OF LAW

Respondents contend that the Government never put in issue in the trial court its right to elect double-consideration damages under § 26(b)(2) and that the court therefore properly entered judgment for the \$2,000 assessments prayed for in the original complaint and the second amended complaint. The original complaint asked for \$2,000 assessments under § 26(b)(1) (R. 22-23); the first amended complaint, in addition to correcting numerous substantive allegations, asked for double-consideration damages under § 26(b)(2) (R. 42-43); the second amended complaint made only the corrections to the substantive allegations and repeated the original prayer for relief under § 26(b)(1) (R. 72-73). The basis for respondents' argument is that the motion to file the first amended

complaint, the only formal pleading in which the § 26(b)(2) election was made, was never ruled upon by the trial court but was voluntarily withdrawn by the Government.

We agree that the first amended complaint was in fact withdrawn without a formal ruling of record and therefore did not constitute an effective election of the § 26(b)(2) remedy. The answer, however, is that the Government does not rely upon the pleadings for its election but rather upon the pretrial order which superseded the pleadings. And in the pretrial order the Government did expressly elect double-consideration damages under § 26(b)(2).

a. Although the proceedings on the motion to file the first amended complaint are not, we think, material, clarification of those proceedings is required in order to correct a possible misstatement in our main brief. We there stated that the district court "denied" the motion to file the first amended complaint (Br. 5). The record reference given (R. 116) was to the district court's post-trial conclusions of law which in turn state that, in considering the motion and other pretrial matters, the court had "ruled" that the original complaint was an irrevocable election of § 26(b)(1) damages and the government had thereupon withdrawn the motion. We acknowledge, as respondents contend (Resp. Br. 4-6), that neither statement is precise insofar as it implies that the court formally "denied" or "ruled" on the motion. In fact, the motion was withdrawn without being put to a formal ruling on the record (see R. 48, 54).

What occurred is more accurately stated in the pretrial order which recites that "Previously the Court has *indicated* that an irrevocable election" was made by the original complaint (R. 101; emphasis added). That is, the court did not formally rule on the motion to file the first amended complaint but merely indicated in the pretrial conferences its view that the relief sought in the original complaint was an irrevocable election and could not be amended. (Government counsel, in order to make the other, needed amendments (to the substantive allegations) which the court indicated it would allow, thereupon withdrew the motion and substituted the second amended complaint, deferring to later proceedings the assertion of the Government's right to elect double-consideration damages.)

b. The point at which the election of double-consideration damages was reasserted and made part of the record for a formal ruling was in the pretrial order. Respondents acknowledge that the pretrial order, quoted at page 5 of our main brief, does expressly state the Government's election of double-consideration damages under § 26(b)(2) (R. 101). The pretrial order, however, is then simply brushed aside by respondents as an "incorrect summation of the record" (Resp. Br. 4). Respondents' mistake is that a pretrial order does not depend for its efficacy upon its accuracy as a summation of the prior pleadings. It operates of its own force as a superseding and controlling statement of the positions of the parties and the issues to be resolved, and, if there be

an inconsistency with the pleadings, it is the pretrial order, not the pleadings, that controls.

That a pretrial order may modify the pleadings and is thereafter controlling is made express by the Federal Rules of Civil Procedure. Rule 16 provides that, after pretrial conferences, the court "shall make an order which recites \* \* \* the amendments allowed to the pleadings \* \* \* and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." Consistently with the Rule, the pretrial order here, after stating the Government's contention that it was not bound by its original complaint and its election of double-consideration damages (R. 101), itself recites, with the approval of the parties,<sup>2</sup> that "this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice" (R. 104).

Respondents' objection that, after withdrawing the first amended complaint and filing the second, the Government never again formally amended its complaint to elect the § 26(b)(2) remedy is, therefore, patently without substance. The election was made in the pretrial order itself, the complaint was thereby superseded (except, of course, for purposes of the reserved contention that the original complaint was

<sup>2</sup> The parties' signatures appear under the caption "Approved as to form and *context*" (R. 104; emphasis added). Presumably "context" is a misprint for "content"—otherwise it is meaningless—but the parties' formal endorsement is immaterial in any event. The order is that of the court, and the proper form by which to object to its content would be by a motion to amend the order, and none was made here.

an irrevocable election), and there remained nothing to amend.<sup>1</sup> In short, the pretrial order fully and effectively stated the Government's contention that it was then entitled to elect double-consideration damages, its election to do so, and respondents' opposing contention that the original complaint was an irrevocable election of the \$2,000 assessments, thereby squarely putting the question to the court for a formal ruling. That ruling was forthcoming in the court's final conclusions of law, which expressly held that the original complaint was an irrevocable election of \$2,000 assessments under § 26(b)(1) and that the purported election of double-consideration damages under § 26(b)(2) in the pretrial order was therefore ineffective (R. 116-117). The question was, therefore, fully presented to and ruled upon by the trial court and no more was required (if, indeed, more was possible) to preserve the question for appeal.

## II

### SECTION 26(B)(2) IS APPLICABLE BY ITS TERMS TO THE TRANSACTIONS INVOLVED

Respondents apparently contend that, even if properly and timely elected, the § 26(b)(2) remedy is inapplicable by its terms to the transactions involved here. The argument is that, since § 26(b)(2) provides for recovery of "twice the consideration *agreed to be*

<sup>1</sup> Respondents' assertion that the "Government elected to proceed to trial on the Second Amended Complaint" (Resp. Br. 6, 27) suffers, of course, from the same misapprehension. The Government proceeded to trial on the pretrial order—which "shall \* \* \* govern the course of the trial of this cause" (R. 104)—and not on the second amended complaint.

given" (emphasis added), it applies only if at some stage of the transaction there is outstanding an executory "agreement" for payment; that all the purchases here were "spot cash transactions" (Resp. Br. 10) in which there was no hiatus between award and payment; and hence, while there was consideration given, there was no consideration "agreed" to be given.

Even accepting the premise that the sales were of the character asserted by respondents—a premise unsupported and in fact contradicted by the record—the argument is, we think, specious. There is no possible justification, of policy or otherwise, for distinguishing between fraudulent purchases effected by a

Respondent Dailey testified that "basically" these sales "were bid sales" conducted both in person and by mail order, and that "If you were awarded the merchandise you paid for it in either cash or by certified check" (R. 173-174). Koenig, former surplus property disposal officer, testified that there were auction sales with sealed bids, spot sales (both bid type and fixed price), and mail order sales on a national solicitation basis for veterans; some of these being restricted to veterans and others with veterans and other buyers participating (R. 237, 241, 244, 245-246, 247, 252). The documents which record the sales reflect the systematic processing which accompanied the determination of the veteran's eligibility, the bid or mail order, the commitment of the agency to sell a particular item to the prospective purchaser, the payment of money, and delivery of possession which was sometimes effected by rail (R. 247-253). At one stage in this processing the veteran signed a certificate reading in part (R. 252):

"The purchaser agrees to buy the property listed herein in accordance with the attached sales conditions \* \* \*"

Obviously at that point the purchaser has agreed to buy certain property at a certain price, and acceptance by the seller makes the agreement binding. No matter how long or short the hiatus between that step and the payment of money and subsequent delivery, there is then, contrary to respondents' assertion, an executory contract of sale.

"bid" and "award," with a time lapse before actual payment, and those effected by a simultaneous exchange of money for goods without an antecedent executory "agreement." In either case the fraud is the same and the injury to the governmental program is the same. The reason for stating the measure as the consideration "agreed" to be paid rather than that "paid"—which respondents suggest would have been more appropriate—was simply to make clear that the subsection would be applicable even if the transaction had not been consummated, not to exclude consummated transactions simply because there was no hiatus during which they were executory.

Moreover, even in an over-the-counter sale the parties necessarily "agree" that the goods shall be exchanged for an agreed-upon consideration. Plainly, for example, if by miscounting the money the purchaser paid less than the stated price, an action on the contract would lie for the balance of the amount "agreed" to be paid. Thus even in the contract sense there is an "agreement" to pay whether or not the contract is executed simultaneously with its making.

It may be noted, finally, that the theory of the Government's proof in this case was in fact the amounts "agreed" to be paid rather than those actually paid. The sales documents introduced showed the prices at which the various sales were concluded. While they also reflect that the full prices were actually paid, it would obviously have made no difference to the Government's recovery if it appeared that, through an error of addition, the Government had in fact been underpaid or overpaid on several purchases. That is

to say, while in this case the amounts "agreed" to be paid and those actually paid appear to have been the same, it remains true that the theory of the proof and of the claimed recovery turns upon the amounts "agreed" to be paid as distinguished from (should there be a variance) the amounts actually paid.

### III

THE TRIAL COURT HAS NO DISCRETION TO SELECT AS MORE "APPROPRIATE" A REMEDY OTHER THAN THAT ELECTED BY THE GOVERNMENT AND DID NOT PURPORT TO DO SO

Intertwined with respondents' argument that § 26 (b)(2) is inapplicable as a matter of law is the quite separate argument that, even if technically applicable, the courts below had and exercised a discretionary power to disallow that remedy on the ground that it was not "appropriate" under the circumstances, presumably because no actual damages had been proved. That question—the power of the court to choose among the several remedies the one it believes most "appropriate"—is the main subject of our opening brief, and only a few additional comments need be made here:

In the first place, no court has in fact found double-consideration damages to be inappropriate in this case. The court of appeals did not purport to make such a finding *de novo* but held only that "It cannot be said upon the record before us that the trial court reached an erroneous conclusion" in so finding (R. 457)—i.e., that the district court did not abuse its discretion in finding double-consideration damages to be inappropriate. The district court, however, never made or even implied such a finding. It based its decision

squarely, exclusively, and explicitly on the ground that the filing of the original complaint was an "irrevocable election" of \$2,000 assessments under § 26(b)(1) (R. 117).<sup>5</sup> The court of appeals, in turn, expressly rejected that ground of decision (R. 456-457). Plainly, having rejected the sole basis for the district court's decision, the court of appeals could not then affirm its judgment on the ground that a finding never made by it was not "clearly erroneous."<sup>6</sup>

<sup>5</sup> Respondents' assertion that the district court did not base its decision on that ground (Resp. Br. 26; 23-24 n. 7) flies in the teeth of the express language of the conclusions of law. The quotation relied upon (Resp. Br. 26 n. 8; R. 445-446) is of the court's oral comments on the number of "acts" to which the \$2,000 assessments under § 26(b)(1) would apply, not on the grounds for applying § 26(b)(1) instead of § 26(b)(2).

<sup>6</sup> In addition, we submit, any question of actual damages or of the relationship of the § 26(b)(2) remedy to probable damages was excluded from the case by the pretrial order. With respect to the remedy under § 26(b)(1) (on the assumption that the court would, as it had indicated, restrict the Government to that remedy), the Government expressly limited itself to claiming the \$2,000 fixed assessments and abandoned any attempt to prove actual damages (R. 94). With respect to the Government's contention that it was entitled to elect double-consideration damages under § 26(b)(2), the only counter-argument preserved in the pretrial order was the claim that the original complaint was an irrevocable election (R. 101). Respondents did not contend that double-consideration damages—if not foreclosed by the original complaint—would be inappropriate because disproportionate to actual damages or in any other way put in issue the question of actual damages. The order limited the issues to be litigated, both of fact and of law, to those stated therein "and no others" (R. 91, 101), thus removing any occasion for the Government to undertake to demonstrate affirmatively the reasonable relationship of the double-consideration remedy to the probable damages.

It is clear in any event, we think, as shown in our main brief, that the statute expressly places the choice among the alternative remedies in the Government and that the district court would have had no power to select one or the other as more "appropriate" even if it had purported to do so. In particular, respondents' apparent suggestion that the court may disallow the Government's election of double-consideration damages unless the Government affirmatively proves actual damages of an order approximating the recovery would defeat the very purpose of the statute. As this Court observed in *Rex Trailer Co. v. United States*, 350 U.S. 148, 153-154, the very reason for providing for liquidated damages is the difficulty, or even impossibility, of proving the actual damages because of the numerous and intangible governmental interests injured by the fraud.

Respondents rely (Resp. Br. 11 n. 3) upon the caveat in the *Rex Trailer* opinion implicit in the concluding statement that "On this record it cannot be said that the measure of recovery \* \* \* is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty" (350 U.S. at 154). We do not disagree with that caveat and may acknowledge the possibility of circumstances arising in which the application of one or the other of the several remedies would produce a recovery which is on its face so totally disproportionate to any possible compensatory purpose as to make it penal. It may be noted, however, that that possibility is more inherent in the \$2,000 assessment of § 26(b)(1), with which the Court was concerned in *Rex Trailer*, than

in the double-consideration measure of § 26(b)(2). The reason is, that the \$2,000 assessment is an arbitrary figure having no necessary relationship to the magnitude of the fraudulent transaction. It applies in terms equally to the fraudulent purchase of a desk stapler or of a defense plant, and circumstances can readily be conjured up in which its strict application would indeed produce extreme results (*e.g.*, 100 separate purchases of \$1.00 desk staplers, producing an assessment of \$200,000). The recovery under § 26(b)(2), on the other hand, being measured by the consideration agreed to be given, is automatically tailored to the magnitude of the fraudulent transaction. Indeed, if double the consideration is a reasonable measure of the probable damages in the typical case—which no one denies—it is difficult to imagine any case in which it would not be, for the recovery always bears the same relationship to the size of the transaction.

In any event, the existence of potential constitutional limits on the recoveries that might be allowable under the Act means only that when those are transgressed the courts may refuse to allow the recovery in whole or in part. It does not mean that within those limits the trial court may restrict the Government in its election to that remedy the court deems more “equitable” or “appropriate”. The choice among the constitutionally permissible remedies of the one best suited to a particular case is a choice the statute expressly commits to the Government, and so long as the application of the remedy elected by the Government does not produce an unconstitutionally

excessive result—which is not claimed here—the Government's election must be given effect.

## IV

THE ELECTION OF DOUBLE-CONSIDERATION DAMAGES WAS  
TIMELY AND DID NOT PREJUDICE RESPONDENTS

If, as we contend, § 26(b)(2) is in terms applicable to the facts here and the Government has the right to elect among the several remedies, the only question remaining is whether the election under § 26(b)(2) was timely made. The district court, as noted above, held that the original complaint was an irrevocable election of the § 26(b)(1) remedy, precluding a later election of § 26(b)(2). The court of appeals rejected that ground and respondents, themselves characterizing it as an "arbitrary stand" (Resp. Br. 26), abandon it here. Respondents' argument is the much

Even the common-law doctrine of election of remedies—itself termed "a harsh, and now largely obsolete rule". (*Friedrichson v. Renard*, 247 U.S. 207, 213)—was never applicable to the mere filing of a complaint praying for one measure of damages rather than another, the remedies being "alternative" but not "inconsistent." See, e.g., *United States Fidelity & Guaranty Co. v. First National Bank*, 172 F. 2d 258, 262, n. 3 (C.A. 5); *McMahan v. McMahon*, 122 S. C. 336, 342, quoted at Resp. Br. 28. Whatever the common-law rule, moreover, it is plain that under the notice-pleading and liberal-amendment philosophy of the Federal Rules of Civil Procedure substantive rights are no longer to be foreclosed on such technical rules of pleading. See *Bernstein v. United States*, 256 F. 2d 697; (C.A. 10); cf. *Hickman v. Taylor*, 329 U.S. 495, 500-501; *Conley v. Gibson*, 355 U.S. 41, 48; 2 Moore, *Federal Practice*, § 2.06(3), p. 362. Equally plainly, there is nothing in the Surplus Property Act requiring the final election to be made upon the initial filing of the complaint. *Bernstein v. United States*; *supra*.

more limited one that, after electing one measure of damages in the original complaint, the Government can thereafter change the election only on the terms on which amendments are generally allowed under the Federal Rules—*i.e.*, by leave of court to be “freely given when justice so requires” (Rule 15(a)).<sup>\*</sup> Respondents then argue that the change of election should not be allowed here because the case was tried on the § 26(b)(1) theory of damages and they would suffer “great prejudice” if the Government were allowed to change its election “after trial” (Resp. Br. 23, n. 7; 29–30).

Even if the election had not been changed until after trial, as respondents assert, we question how the measure of damages—both alternatives being based on the same transactions and the same proof—could in fact have affected the conduct of the trial. The complete answer, however, is that the Government asserted its final election of § 26(b)(2) damages *before*, and not after, the trial. The change of election was made, as shown in Point I, *supra*, in the pretrial order entered almost a full month before trial (see R. 105),

---

<sup>\*</sup> Resp. Br. 21–22. The above, as we understand it, is the only argument of respondents that goes strictly to the question of the timing of the election. Many of the arguments which respondents subsume under the heading of “election” go to the quite different questions we have already discussed—whether the Government *ever* made an election of § 26(b)(2) damages (Point I); whether § 26(b)(2) applies to the transactions as a matter of law (Point II); and whether the court can reject a remedy elected by the Government on the ground that another is more appropriate (Point III)—and have been dealt with in the preceding portions of this reply brief.

and even at that time respondents had been on notice ever since the abortive proceedings on the motion to file the first amended complaint that the Government intended to assert its election of § 26(b)(2) damages at an appropriate time. At the time of the pretrial order, respondents made no claim of prejudice resulting from the change of election, and the pretrial order preserved as an objection to the change of election only the contention that the original complaint was an irrevocable election. Respondents were therefore fully aware of the Government's election of § 26(b)(2) damages—subject only to the asserted bar that the original election was irrevocable—well before they proceeded to trial and cannot now claim they were misled in the conduct of the trial. In short, respondents' claims of prejudice resulting from the change of election are based entirely on their basic misapprehension, dealt with in *Point 1 supra*, of the effect of the pretrial order. When their claim that no election of § 26(b)(2) damages was ever made falls, their claims of prejudice fall with it.

Respectfully submitted.

J. LEE RANKIN,

*Solicitor General.*

GEORGE COCHRAN DOUB,

*Assistant Attorney General.*

WAYNE G. BARNETT,

*Assistant to the Solicitor General.*

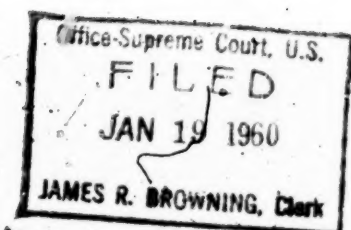
MORTON HOLLANDER,

ANTHONY L. MONDELLO,

*Attorneys.*

OCTOBER 1960.

LE COPY



# In the Supreme Court

OF THE  
**United States**

OCTOBER TERM, 1959

No. ~~605~~ 24

UNITED STATES OF AMERICA,

*Petitioner,*

VS.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E.  
SCHWARTZ and HARLAN L. MCFARLAND,  
*Respondents.*

REPLY TO PETITION FOR A WRIT OF CERTIORARI  
to the United States Court of Appeals  
for the Ninth Circuit.

W. E. JAMES,  
CONRON, HEARD & JAMES,  
Suite 7, Habersfelde Building,  
Bakersfield, California,  
*Attorneys for Respondents.*



## Subject Index

|                                    |      |
|------------------------------------|------|
| Opinions below .....               | Page |
| Jurisdiction .....                 | 2    |
| Statute involved .....             | 2    |
| Reasons for denying the writ ..... | 2    |

### Point 1:

|   |   |
|---|---|
| The question raised is not contained in the record of proceedings of the courts below ..... | 3 |
|---|---|

### Point 2:

|   |   |
|---|---|
| By proceeding to trial upon the second amended complaint the Government waived any right it might have had to seek permission of the trial court to change its remedy ..... | 6 |
|---|---|

### Point 3:

|  |   |
|--|---|
| The evidence presented by the Government would not have supported any recovery under the second alternative of the Act ..... | 7 |
|--|---|

### Point 4:

|  |   |
|--|---|
| The decision is not in conflict with <i>Bernstein v. United States</i> ..... | 9 |
|--|---|

### Point 5:

|  |    |
|--|----|
| There is no valid reason for granting the writ ..... | 10 |
|--|----|

### Point 6:

|  |    |
|--|----|
| The question is moot because the Government has accepted promissory notes in payment of the judgment and monies have been paid upon the promissory notes ..... | 11 |
|--|----|

|                  |    |
|------------------|----|
| Conclusion ..... | 14 |
|------------------|----|

### Table of Authorities Cited

|  | Pages    |
|--|----------|
| Berustein v. United States .....   | 2, 9, 10 |
| First Nat. Bank v. U.S., 2 F. Supp. 107 .....  | 6        |
| First National Bank of Birmingham v. U.S., 117 Fed. 486 .....  | 5        |
| Minneapolis Nat. Bank of Minneapolis, Kan. v. Liberty Nat.<br>Bank of Kansas City, C.C.A. Kan., 72 F. 2d 434 ..... | 7, 10    |
| Rex Trailer Co. v. U.S. (1956), 100 Law. Ed. 160 .....   | 5        |
| U.S. v. American Parking Car, 125 Fed. Supp. 788 .....   | 5        |
| U.S. v. Grannis, 172 Fed. 2d 507 .....   | 5        |
| U.S. v. Hess, 87 Law. Ed. 443 .....  | 4        |
| U.S. v. Oregon Lumber Co., 260 U.S. 290, 67 L.Ed. 261, 32<br>S.Ct. 100 .....                                       | 6, 10    |
| U.S. v. Rohlechner, 157 Fed. Supp. 126 .....   | 4        |

# In the Supreme Court

OF THE

United States

OCTOBER TERM, 1959

No.

UNITED STATES OF AMERICA,

vs:

*Petitioner,*

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E.

SCHWARTZE and HARLAN L. MCFARLAND,

*Respondents.*

REPLY TO PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals

for the Ninth Circuit.

Come now respondents, E. B. Hougham, Owen Dailey, William E. Schwartze and Harlan L. McFarland, in answer to the Petition of the Solicitor General for a Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Ninth Circuit and respectfully request that said Petition be denied.

**OPINIONS BELOW**

The opinions below are correctly stated in the Solicitor's Petition.

---

**JURISDICTION**

Jurisdiction is correctly stated in the Petition.

---

**STATUTE INVOLVED**

The statute involved is correctly stated in the Petition.

---

**REASONS FOR DENYING THE WRIT**

It is submitted that the Writ should be denied for the following reasons:

1. The question raised is not contained in the record of proceedings of the courts below.

2. By proceeding to trial upon the second amended complaint the Government waived any right it might have had to seek permission of the trial court to change its remedy.

3. The evidence presented by the Government would not have supported any recovery under the second alternative of the Act.

4. The decision is not in conflict with *Bernstein v. United States*.

5. There is no valid reason for granting the writ.

6. The question has become moot.

## POINT 1:

THE QUESTION RAISED IS NOT CONTAINED IN THE RECORD  
OF PROCEEDINGS OF THE COURTS BELOW.

The question presented by the Government in its petition—whether the Surplus Property Act, which confers upon the Government the right to elect one of three different measures of damages, permits the trial court, rather than the Governmental Officials acting under the Solicitor General to make the election—was never properly presented to the Court below and has never been passed upon by it, or by the Appellate Court in this proceeding. It is true, as suggested on pages 4 and 5 of the petition, that the pre-trial order contained a reference to the Government's then contention that while it (the officials acting under the Solicitor General) alone had the sole right to make the election, that it further then contended it was entitled to make its election at any time prior to judgment. Such a procedure, however, is insufficient to bring the point either to the trial court for a ruling, or to raise the question on appeal, in view of the other procedure previously taken by the Government in voluntarily withdrawing a first amended complaint, which sought a recovery upon the basis of twice the consideration agreed to be given, and thereafter filing a second amended complaint upon which the Government went to trial, whose prayer contained the selection of the first remedy of \$2,000.00 for each act. This appears on pages 49 and 54 of the Transcript and is subsequently set forth in Respondents' Brief, pages 3 to 6. It is thus seen that the Court at no time made any election, but proceeded in accordance with normal

and usual trial procedures to interpret the evidence within the framework of the issue raised in the complaint upon which the Government elected to stand trial.

All that the trial court did, which the Appellate Court affirmed, was to interpret the evidence with the end in view of equitably determining the scope, breadth and number of tricks and/or devices involved. This has always been the prerogative of the trial court.

The authorities are clear that where the tricks or devices used do not involve a monetary fraud, the mere fact that monies are eventually paid does not make the scheme a monetary fraud.

The leading case upon the subject is *U.S. v. Hess*, 87 Law. Ed. 443. There open bidding was required on WPA projects and certain contractors conspired to prevent competitive bidding, as a result of which 57 WPA projects were contracted for. Under these projects thousands of individual items of property and payments of money were involved. The Government contended that the \$2,000.00 penalty applied to each of the thousands of items. The Court held that there was one conspiracy only in reference to each WPA project and allowed a recovery upon the basis of 57 projects.

In *U.S. v. Rohleacher*, 157 Fed. Supp. 126, there were considered 8 main contracts, under which 96 purchase orders were involved. The Government contended for the \$2,000.00 penalty on each of the 96 pur-

chase orders. The Court limited the recovery to the 8 main contracts only.

In *U.S. v. Grannis*, 172 Fed. 2d 507, 10 vouchers involving fictitious claims for rental of 130 cars were involved. The Government contended that there were 140 violations, e.g., the 10 vouchers plus the 130 units and claimed damages in the amount of \$280,000.00. The recovery was limited to 10 violations, and \$20,000.00 only was allowed. (Certiorari denied by the Supreme Court.)

In *First National Bank of Birmingham v. U.S.*, 117 Fed. 486, the Bank sued for \$12,000.00 due upon a Government contract assigned to it. In offset to this demand the Government claimed \$2,000.00 per voucher on 13 vouchers, all of which were fraudulent claims since they were demands for work not performed. The Government was allowed the offset because each voucher was tainted with a separate fraudulent claim.

In *U.S. v. American Parking Car*, 125 Fed. Supp. 788, vouchers for payment were submitted containing separate false statements. Held a separate act for each separate false statement.

In *Rex Trailer Co. v. U.S.* (1956), 100 Law. Ed. 160, 5 trucks were purchased through schemes involving 5 separate veterans.

The recovery of \$2,000.00 for each act was allowed upon the theory that the fraudulent use of each veteran's name constituted one transaction. It is true that the cases cited deal with the application of the so-called "False Claims Act" and not the "Surplus

Property Act". The question involved, however, is identical in both Acts because they both contain the identical civil penalty clause, and both Acts necessarily leave to the trier of fact the right to define the extent and character and breadth of the trick, scheme or device, dependent upon the particular circumstances of each case.

---

POINT 2:

**BY PROCEEDING TO TRIAL UPON THE SECOND AMENDED COMPLAINT THE GOVERNMENT WAIVED ANY RIGHT IT MIGHT HAVE HAD TO SEEK PERMISSION OF THE TRIAL COURT TO CHANGE ITS REMEDY.**

Conceding, but not admitting, that the Government might have upon equitable terms, with permission of the Court, at a reasonable time before trial, amended its complaint to change its form of remedy sought, it certainly waived that right by going to trial upon the second amended complaint, which sought a recovery of \$2,000.00 per act. The Government may be estopped of record by its attorneys and officers representing it when once in court. *First Nat. Bank v. U.S.*, 2 F. Supp. 107.

In fact it has been held that the commencement of any proceeding to enforce one remedial right, in a court having jurisdiction to entertain such a proceeding, is such a decisive act as constitutes a conclusive election, barring the subsequent prosecution of any inconsistent remedial rights. *U.S. v. Oregon Lumber Co.*, 260 U.S. 290, 67 L. Ed. 261, 42 S. Ct. 100:

*Minneapolis Nat. Bank of Minneapolis, Kan. v. Liberty Nat. Bank of Kansas City, C.C.A. Kan., 72 F. 2d 434.*

**POINT 3:**

**THE EVIDENCE PRESENTED BY THE GOVERNMENT WOULD NOT HAVE SUPPORTED ANY RECOVERY UNDER THE SECOND ALTERNATIVE OF THE ACT.**

Reference is made to pages 5 and 6 of the Petition and to those portions of the Transcript referred to in the footnotes. It will be noted that in every case the document involved is an invoice marked "Paid in Full". In no part of this record is there any contract wherein monies are "agreed to be paid". Every transaction in which money was involved was a spot cash transaction where the money was paid and the title transferred simultaneously. Yet the portion of the statute which the Government seeks to use as a springboard to recover double again the value of the articles, after having been paid in full the fair value of the articles, as fixed by the Government's own pricing agency, reads as follows:

"(2) shall, if the United States shall so elect, pay to the United States as liquidated damages a sum equal to twice the consideration *agreed to be given* by such person to the United States or any governmental agency, or"

A fair reading of the Act as a whole would disclose an intention upon the part of Congress to offer various remedies to cover every conceivable type of situation and to leave to the Government the option of

selecting the remedy appropriate to the occasion; thus, certain types of frauds which would not involve fraud of a monetary nature or an executory contract could be appropriately reached under the first section; executory contracts which involved a monetary fraud, such as a conspiracy to avoid full payment, or to unlawfully secure the reduction of an obligation, could be appropriately dealt with under the second portion; and where the property still remained within reach of the Government, it could recover under the third portion. This is a fair interpretation of the Act, and not a harsh, unconscionable, unreasonable and unrealistic interpretation, such as the Government seeks.

The report of the Senate Committee on Military Affairs, at the time the Act was under consideration by that body, discloses the following:

**"Penalty and Fraud Provisions—**

Subsection (b) of this section deals with the civil liability of persons who engage in false, fraudulent, or fictitious activities, or conceal or misrepresent material facts, or act with intent to defraud the United States, or who enter into an agreement or conspiracy or cause other people to do any of the foregoing. The United States is given the option of electing among three different measures of damages—

(1) Any person engaged in such activities can be *sued* for the sum of \$2,000 for each such act, plus twice the amount of any damage sustained by the United States, plus the cost of suit.

(2) The United States may recover from such person twice the consideration *which he agreed to give to it.*"

The language of the Senate Committee Report discloses a clear intent to limit the second remedy to transactions which involved contracts executory in nature where a portion of the contract remained to be paid. This view was adopted by the trial court's finding No. 4 (Transcript 108); finding No. 8 (Transcript 111); finding No. 12 (Transcript 114); and its decision was approved by the Appellate Court, which stated:

"The trial court unquestionably believed that twice the consideration 'agreed to be paid' was not applicable here. And it seems much more apposite to a contract where the property has not passed but a consideration has been agreed upon."

---

**POINT 4:**

**THE DECISION IS NOT IN CONFLICT WITH  
BERNSTEIN v. UNITED STATES.**

The *Bernstein* case is distinguishable from the case at bar in several vital features. In the first place, the point was properly presented to the trial court by the Government, and a ruling was there made. The ruling was made that the Government was held to its election because of the inequities which would flow from allowing it to change its position. On appeal this position was reversed, because the Appellate Court felt that the inequities were not of sufficient gravity to prevent the Government from exercising its option upon reasonable notice, the consent of the trial court, and at a time when no prejudice would result to the litigants. Second, the Government did not seek

to change from the first to the second portion of the Act, but from the first to the third alternative, which it sought to further combine with the recovery of the proceeds of the resale of the property.

Under the doctrine of constructive trust, there was evidence in the record taken in the Court below which would support a recovery at least to some extent upon the alternative remedy requested. In the instant case there is no evidence in this record which would support a recovery in any amount under the second alternative, because the transactions were of such character that never at any time was any money "agreed to be paid".

Finally, the *Bernstein* decision is in conflict with *U.S. v. Oregon Lumber Company*, supra; and *Minneapolis Nat. Bank of Minneapolis, Kan. v. Liberty Nat. Bank of Kansas City*, supra, which hold that the commencement of any proceeding to enforce one remedial right in a court having jurisdiction to entertain such proceeding, is a sufficiently decisive act as constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial rights.

---

**POINT 5:**

**THERE IS NO VALID REASON FOR GRANTING THE WRIT.**

It has been previously pointed out that the trial court was not attempting to select one of the three alternative remedies provided by the Act, but was merely applying the evidence to the remedy selected by the Government. For years this has been accepted

procedure. Appellee's Brief pages 26-28. It is difficult to see how this decision can affect adversely any cases now pending, or others which may be filed in the future, because it is a sound application of the clear provisions of the Act.

The Government's argument on pages 10 and 11 of its brief is self-destructive. The proposition for which it argues would create, not eliminate, the suggested hazard of forcing litigants to prepare a defense to all three provisions of the Act, if the Government were permitted to wait until the conclusion of a trial to quit changing its mind.

**POINT 6:**

**THE QUESTION IS MOOT BECAUSE THE GOVERNMENT HAS ACCEPTED PROMISSORY NOTES IN PAYMENT OF THE JUDGMENT AND MONIES HAVE BEEN PAID UPON THE PROMISSORY NOTES.**

On April 20, 1958, promissory notes were forwarded the Government to cover the judgment entered therein and to release the judgment liens filed in Los Angeles County and Kern County.<sup>1</sup>

1<sup>st</sup> April 18, 1958

Richard A. Lavine, Esq.  
Assistant United States Attorney  
Southern District of California  
600 Federal Building  
Los Angeles 12, California

Dear Mr. Lavine: Re: U.S. vs. Hougham, et al  
Civil No. 1423-ND

Enclose the following:

1. Promissory Note dated April 14, 1958, executed by E. B.

The notes were accepted by the Government and a release of liens executed.<sup>2</sup>

Hougham and Owen Dailey, payable to the Treasurer of the United States, in the sum of \$2,054.36;

2. Promissory Note bearing the same date, in the same amount, payable to the same party executed by E. B. Hougham and William E. Schwartz; and

3. Promissory Note dated April 10, 1958, executed by E. B. Hougham and Harlan L. McFarland, payable to the Treasurer of the United States, in the sum of \$4,108.72.

You may consider these documents delivered when you have executed and returned to me, with your signature duly acknowledged, the Full Release of Judgment Liens which I also enclose.

Thanking you kindly for your courtesies in respect to this matter, I am

Yours very truly,  
Calvin H. Conron, Jr. of  
Conron, Heard & James

CHC:HR"

<sup>2</sup>"April 21, 1958

Conron, Heard & James  
Attorneys at Law  
Suite 7, Haberfelde Building Arcade  
Bakersfield, California

Re: United States v. Hougham, et al.  
Civil No. 1423-ND

Gentlemen:

Reference is made to your letter of April 18, 1958. In accordance with your instructions we enclose Full Release of Judgment Liens for the Counties of Los Angeles and Kern, respectively. The signature of Richard A. Lavine has been acknowledged on each of these documents.

Very truly yours,  
Laughlin E. Waters  
United States Attorney  
Richard A. Lavine  
Assistant U. S. Attorney

RAE:lp.  
Enc."

The Government has accepted monies in payment of the installments provided for in the notes.<sup>3</sup>

Under these conditions the Government should be estopped from further pressing its demands in this proceeding.

3<sup>rd</sup> April 15, 1959

Mr. Wayne M. Hamilton  
Conron, Heard & James  
Attorneys at Law  
Suite 7, Haberfelde Building Arcade  
Bakersfield, California

Re: U. S. Hougham, et al  
No. 1423 (ND) Civil

Dear Sir:

Receipt is acknowledged of your letter of April 14, 1959, enclosing three checks, namely, \$1242.09, \$1242.09, and \$2484.18.

We are enclosing the following receipts:

Receipt No. 44652, dated April 15, 1959, for \$2484.18 for Harlan L. McFarland and E. B. Hougham

Receipt No. 44653, dated April 15, 1959, for \$1242.09, for William E. Schwartz and E. B. Hougham

Receipt No. 44654, dated April 15, 1959, for \$1242.09 for Owen Dailey and E. B. Hougham.

Thank you for your cooperation in the matter.

Very truly yours,  
Laughlin E. Waters  
United States Attorney  
Carla A. Hills  
Assistant U. S. Attorney

CAH:mlb  
Judgment Unit  
encls."

**CONCLUSION**

For the foregoing reasons it is respectfully submitted that the Petition should be denied.

Dated, Bakersfield, California,  
January 14, 1960.

Respectfully submitted,

W. E. JAMES,

CONRON, HEARD & JAMES,

*Attorneys for Respondents.*

# SUPREME COURT OF THE UNITED STATES

No. 24.—OCTOBER TERM, 1960.

|                           |                            |                          |
|---------------------------|----------------------------|--------------------------|
| United States of America, | } On Writ of Certiorari to |                          |
| Petitioner.               |                            | the United States Court  |
| v.                        |                            | of Appeals for the Ninth |
| E. B. Hougham, et al.     | } Circuit.                 |                          |

[November 7, 1960.]

MR. JUSTICE BLACK delivered the opinion of the Court.

Section 16 of the Surplus Property Act of 1944 gave priority preferences to veterans in the purchase of surplus war materials. 58 Stat. 765. Section 26 authorized the United States to recover damages against any person who obtains such property from the Government by "fraudulent trick, scheme, or device . . . ." The complaint in this case charged that respondent Hougham, a nonveteran, combined with the other respondents, who are veterans, and obtained for his own business purposes hundreds of items of surplus property, including trucks, trailers and other equipment, by fraudulent use of the veteran respondents' priority certificates. After hearings, the District Court found respondents guilty of the fraud as charged and awarded damages in the amount of \$8,000. Both sides appealed. The Court of Appeals affirmed, rejecting both the Government's contention that the damages awarded were inadequate and the respondents' contentions that the finding of fraud was clearly erroneous and that the claims were barred by the statute of limitations. 270 F. 2d 290. Because the case raises important questions concerning the interpretation and application of the Surplus Property Act, we granted the Government's petition for certiorari. 361 U. S. 358.

The respondents first contend that the entire controversy here has been settled, is therefore moot, and that the

Government is estopped from further pressing claims against them. This contention rests upon the fact—set out in respondents' brief and not disputed by the Government—that after the trial court judgment was entered and before it was affirmed by the Court of Appeals, the Government accepted from respondents promissory notes totalling \$8,000, the amount of the trial court judgment. The contention is that this fact alone renders the case moot or at least creates some sort of estoppel against the Government. We disagree. It is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim. See, for example, *Embry v. Palmer*, 107 U. S. 3; *Erwin v. Lowry*, 7 How. 172, 183–184. This case provides a perfect example of the good sense underlying that rule. For here it was the respondents themselves who proposed payment of the \$8,000, asserting expressly as their purpose in so doing the obtaining of a "Full Release of Judgment Liens" filed in the Counties of Los Angeles and Kern. The Government did nothing more in the entire transaction than accept the notes and execute the requested release. Since that release was expressly denominated only as a "Full Release of Judgment Liens" for the Counties of Los Angeles and Kern, it simply is not and cannot properly be interpreted to constitute a full release of all the Government's claims against respondents. Moreover, since the transfer of the notes occurred prior to the decision of the Court of Appeals, it is clear that neither of the parties regarded that transfer as an accord and satisfaction of the entire controversy for both pursued their appeals in that court. Thus respondents' contention here is totally inconsistent with their position in the Court of Appeals

where they sought to avoid *all* liability to the Government, including liability for the \$8,000 they had already paid. For that position must necessarily have been predicated upon the view that the payment was without prejudice to the rights of either party as those rights might come to be established by subsequent judicial decree. Under such circumstances, the contention that the Government has lost its right to press its claim for the full amount of damages it believes due is wholly untenable.

We find it unnecessary to discuss at length respondents' second contention—that the claims asserted by the Government are barred by the statute of limitations. It is sufficient to say that the courts below were entirely correct in rejecting that contention for, resting as it does upon the assumption that recoveries under § 26 (b) are penalties, it is inconsistent with our holding in *Rex Trailer Co. v. United States*, 350 U. S. 148.

We therefore proceed to the principal controversy—the question of the adequacy of the damages awarded to the Government. Section 26 (b) provides in relevant part that those who obtain property by the kind of fraud established here:

“(1) shall pay to the United States the sum of \$2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

“(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

“(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as

liquidated damages any consideration given to the United States or any Government agency for such property."

In its complaint as originally filed, the Government claimed recovery as authorized by § 26 (b) (1)—\$2,000 for each fraudulent act ~~plus double the amount of~~ any actual damages. Subsequently, the Government attempted to file a First Amended Complaint claiming liquidated damages under § 26 (b) (2). Upon indication of the trial judge that the claim in the original complaint under § 26 (b) (1) amounted to an irrevocable election of remedies, but without any formal ruling to that effect, the Government withdrew the First Amended Complaint and filed a Second Amended Complaint in which it reverted to its original claim under § 26 (b) (1). Still later however, following pretrial proceedings under Rule 16 of the Federal Rules of Civil Procedure, the district judge, with the approval of counsel for both parties, entered a pretrial conference order which provided, "[T]his order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice." And the order expressly enumerated the "issues of law" that remained "to be litigated upon the trial." One of the issues so reserved was the legal correctness of the Government's argument that it was entitled to recover "double the amount of the sales price of the vehicles described in the Second Amended Complaint," that it was "entitled to make its election [as between § 26 (b) (1) and § 26 (b) (2)] at any time prior to judgment" and that it did then elect "in the event of judgment in its favor, to receive as liquidated damages a sum equal to twice the consideration agreed to be given to the United States." The District Court ultimately decided this legal issue against the Government, holding that the original complaint constituted an irrevocable election, and proceeded to award damages of \$8,000 under § 26 (b) (1).

UNITED STATES v. HOUGHAM

The Court of Appeals affirmed this judgment on a different ground. It held that the refusal of the District Court to permit recovery under § 26 (b)(2) was within its power to determine the appropriate remedy under § 26 (b), asserting that no issue as to election of remedies was even involved in the case. 270 F. 2d at 293.

The Government contends that denial of recovery under § 26 (b)(2) cannot be justified on either of the theories adopted below. Respondents contend that the Government waived its right to urge this contention by voluntarily proceeding to judgment on the Second Amended Complaint. This contention is predicated upon the failure of the Government to get a formal ruling on its First Amended Complaint before withdrawing it and filing the Second Amended Complaint. But, as shown above, the pretrial order and the conclusions of law of the District Court both show that the Government urged its right to change its election up to the time judgment was rendered. That pretrial order, as authorized by Rule 16, conclusively established the issues of fact and law in the case and declared that the issues so established should "supplement the pleadings and govern the course of the trial . . . ." One of these supplementary issues was the Government's contention that it was entitled to recover under § 26 (b)(2), rather than under § 26 (b)(1) as claimed in the Second Amended Complaint. Thus the pretrial order changed the claim in that complaint from § 26 (b)(1) to § 26 (b)(2) insofar as the Government had the power to change its election, and posed an issue which required adjudication by the District Court. That such was the effect of the order is clear from the language of Rule 16 which provides that the court, after pretrial conference, "shall make an order which recites . . . the amendments allowed to the pleadings . . . and such order when entered controls the subsequent course of the action, unless modified at the trial

to prevent manifest injustice." Since the pretrial order here reserved the legal question as to the Government's right to change its election and since the court expressly decided that question against the Government,\* the question most certainly was not waived and must here be determined.

Thus, we come to the question whether the courts below were correct in holding that the Government was not entitled to damages under § 26 (b) (2). With respect to the theory adopted by the District Court that the Government's original complaint constituted an irrevocable election of remedies, we can find nothing either in the language of § 26 (b) or in its legislative history which lends the slightest support to such a construction. This fact leads naturally to the conclusion that the ordinary liberal rules governing the amendment of pleadings are applicable. The applicable rule is Rule 15 of the Federal Rules of Civil Procedure, which was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result. Despite respondents' argument to the contrary, we see this case as one where there plainly was no such prejudice. In such a situation, acceptance of respondents' contention on this point would subvert the basic purpose of the Rule. "The Federal Rules reject the approach that pleading is a game

---

\*The language of the trial judge on this point was unequivocal:

"This Court rules that the plaintiff United States can only receive liquidated damages under the provisions of Section 26 (b) (2) if it elects to receive only such damages originally in the action; that since the United States sought damages under the provisions of Section 26 (b) (1) in the original complaint, that such is an irrevocable election; that the plaintiff United States cannot thereafter amend its complaint to seek liquidated damages under the provisions of Section 26 (b) (2), or otherwise elect to receive liquidated damages under the provisions of Section 26 (b) (2), but that the United States is thereafter limited as the measure of its recovery for liquidated damages to those liquidated damages set forth in Section 26 (b) (1)."

UNITED STATES v. HOUGHAM.

7

of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U. S. 41, 48. We therefore conclude that under the circumstances of this case the Government had a right to amend its pleadings and that the District Court erred in refusing to permit such amendment.

The alternative theory of the Court of Appeals appears, upon examination, to be equally untenable. The Court of Appeals interpreted § 26 (b) as placing power in the District Court to determine, according to the evidence presented in any particular case, which of the three subsections would be most appropriate and to require the Government to accept judgment under that subsection. That interpretation collides with the express language of § 26 (b) which provides for recovery under any one of the three subsections "if the *United States* shall so elect." (Emphasis supplied.) Since the language of the section is conclusive on this point, the theory adopted by the Court of Appeals must also be rejected.

The respondents' final contention is that in any event they are entitled to a new trial. Obviously, there need be no new trial on the fraud issue. But respondents also urge that there is no support in the record for a judgment fixing the Government's recovery under § 26 (b) (2) at "twice the consideration agreed to be given" for the vehicles. There was no consideration "agreed to be given," the argument proceeds, because all the transactions involved cash sales at a price fixed by the Government. This argument, while ingenious, is not sound. Cash sales, like others, must follow an agreement of the parties with regard to consideration "to be given." Respondents' contention to the contrary would, if accepted, allow any purchaser from the Government to effectively avoid liability under § 26 (b) (2) simply by being careful to make all of its fraudulent dealings in

cash. Plainly, however, the Government suffers just as much from a fraudulent cash sale as from a fraudulent credit sale. An interpretation of § 26 (b) (2) which allows recovery for the one but not for the other cannot be accepted. The respondents' contention for a new trial must be rejected.

The judgment is therefore reversed and the cause remanded to the District Court with directions to enter judgment for the United States under § 26 (b) (2).

*It is so ordered.*

# SUPREME COURT OF THE UNITED STATES

No. 24.—OCTOBER TERM, 1960.

|                           |   |
|---------------------------|---|
| United States of America, | } On Writ of Certiorari to  |
| Petitioner,               |   |
| <i>v.</i>                 |   |
| E. B. Hougham, et al.     | } the United States Court<br>of Appeals for the Ninth<br>Circuit. |

[November 7, 1960.]

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE DOUGLAS joins, dissenting.

With all deference, I can not agree and must dissent for two reasons.

*First.* One may not appeal from a money judgment that he has collected and satisfied. Here, as the Court recognizes, after the judgment was entered the Government accepted promissory notes from respondents in payment of the judgment. I think, with I respectfully submit, the support of all the relevant cases—which are legion—that the Government, having recovered a judgment for \$8,000, over the serious protests of respondents that they owed it nothing, and having, with knowledge of all the facts, accepted the benefits of the judgment by collecting and satisfying it, cannot thereafter prosecute an appeal to reverse it.

The Court relies on *Embry v. Palmer*, 107 U. S. 3, and *Erwin v. Lowry*, 7 How. 172, 184, for its conclusion that the Government may prosecute this appeal from the judgment notwithstanding it has satisfied it. But, with deference, I must say those cases do not support the Court's conclusion. The issue in the *Embry* case was whether Embry was entitled to \$9,185.18, as he claimed, or to only \$2,296.29, as the respondents contended and admitted to be due. The court awarded recovery of only the latter sum which Embry accepted. He afterwards

appealed from the judgment, and it was held that he might do so for, as the court pointed out: "The amount awarded, paid, and accepted constitutes no part of what is in controversy." *Id.*, at 8. How different from the situation here! That case was like the later one of *Reynes v. Dumont*, 130 U. S. 354, where the appellants received so many of certain bonds as were not taken to satisfy the judgment from which they appealed. It was contended that their action in doing this so completely accepted the judgment that they could not appeal. In rejecting that contention, this Court said:

"The acceptance by appellants of what was confessedly theirs cannot be construed into an admission that the decree they seek to reverse was not erroneous, nor does it take from appellees anything, on the reversal of the decree, to which they would otherwise be entitled. *Embry v. Palmer*, 107 U. S. 3, 8."

Those cases fall within a well-recognized but very narrow exception to the general rule that is applicable here. Similarly, the *Erwin* case did not involve the collection and satisfaction of a judgment. Rather, it involved only the performance by Erwin of a minor collateral "condition imposed upon him before he [could] have the fruits of the decree" in equity. *Id.*, at 184. Like *Embry*, that case does not at all rule the question here presented.

The case in this Court that most nearly rules our question is *Gilfillan v. McKee*, 159 U. S. 303. There appellant claimed an interest in a special fund of \$7,070 and also claimed to be entitled jointly to participate in a general fund of \$147,057.63. A portion of the special fund was awarded to him in one division of the judgment, but another division of the judgment denied to him any right to participate in the general fund. He appealed, and was

met with the claim that by accepting the award of a part of the special fund, he had taken under the judgment and therefore could not appeal from it. Recognizing that one cannot appeal from a judgment that he has collected and satisfied, the Court said: "... the acceptance of the whole or a part of a particular amount awarded to a defendant might perhaps operate to estop him from insisting upon an appeal." But the court found that "there were practically two decrees in this case, one applicable to the special fund, which, in the bill, the subsequent pleadings, and in the decree, had been kept as a distinct and separate matter, a portion of which fund was awarded to McPherson; and the other applicable to the general fund in which McPherson had been denied any participation whatever." And the court held that "his acceptance of a share in the special fund did not operate as a waiver of his appeal from the other part of the decree disposing of the general fund." *Id.*, at 311.

The Fourth Circuit has flatly ruled this question in *Finefrock v. Kenova Mine Car Co.*, 37 F. 2d 310, among other cases. There the appellant accepted payment of a judgment for an amount substantially less than he claimed and afterwards appealed. In holding that he could not appeal from a judgment that he had collected and satisfied, the court said at 314:

"We do not find it necessary to enter into a discussion of these questions in view of the acceptance by the appellant of the amount allowed him in full satisfaction and discharge of the judgment. He contends that there is no inconsistency in his acceptance of the money and the prosecution of the appeal, relying on such decisions as *Embry v. Palmer*, 107 U. S. 3, 8, 2 S. Ct. 25, 27 L. Ed. 346; *McFarland v. Hurley* (C. C. A.) 286 F. 365; *Carson Lumber Co. v. St. Louis, etc., Railroad Co.* (C. C. A.) 209 F. 191.

193; *Snow v. Hazlewood* (C. C. A.) 179 F. 182. But it is obvious that he falls within the general rule and not within the exceptions thereto as set out in *Carson Lumber Co. v. St. Louis, etc., Railroad Co., supra*.<sup>1</sup>

The Third Circuit has likewise flatly ruled the question in the same way, *Smith v. Morris*, 69 F. 2d 3; so has the Fifth Circuit, *Kaiser v. Standard Oil Co.*, 89 F. 2d 58; *White & Yarbrough v. Dailey*, 228 F. 2d 836, and the Eighth Circuit, *Carson Lumber Co. v. St. Louis & S. F. R. Co.*, 209 F. 191. Literally dozens of cases by the courts of last resort in almost all the States in the Union have so held.<sup>2</sup>

I, therefore, respectfully submit that the settled law requires the conclusion that the Government, having col-

<sup>1</sup>In *Carson Lumber Co. v. St. Louis & S. F. R. Co.*, 209 F. 191 (C. A. 8th Cir.), the Court said, at 193-194:

"It is undoubtedly the general rule that a party who obtains the benefit of an order or judgment, and accepts the benefit or receives the advantage, shall be afterwards precluded from asking that the order or judgment be reviewed. Nevertheless, this rule is not absolute where the judgment or decree is not so indivisible that it must be sustained or reversed as a whole. It has no application to cases where the appellant is shown to be so absolutely entitled to the sum collected upon the judgment that the reversal of it will not affect his right to the amount accepted (*Reynes v. Dumont*, 130 U. S. 354-394; 9 S. Ct. 486, 32 L. Ed. 934), especially where there is not present conduct which is inconsistent with the claim of a right to reverse the judgment or decree, which it is sought to bring into review (*Embry v. Palmer*, 107 U. S. 3-8, 2 S. Ct. 25, 27 L. Ed. 346; *Merriam v. Haas*, 3 Wall. 687, 18 L. Ed. 29; *United States v. Dashiell*, 3 Wall. 688, 18 L. Ed. 268)."

<sup>2</sup>Those interested will find many of those cases collected in the notes to § 214 of *Am. Jur.*, Vol. 2, *Appeal and Error*, p. 975, where the authors have regarded the rule as so certain and universal as to permit them flatly to say: "The general rule . . . is that a litigant who has, voluntarily and with knowledge of all the material facts, accepted the benefits of an order, decree or judgment of a court, cannot afterwards take or prosecute an appeal or error proceeding to reverse it."

lected and satisfied this judgment with knowledge of all the facts, cannot prosecute this appeal to reverse it. This appeal should, therefore, be dismissed.

*Second.* At all events, the Government is not entitled to a reversal of the judgment, because it went to trial, and proceeded all the way to judgment, upon a complaint that asked damages only under subdivision (1) of § 26 (b), not under subdivision (2) of that section. The procedural chronology was as follows. In its original complaint the Government sought damages "of \$2,000 for each such act," under subdivision (1). It thereafter filed a motion for leave to file a First Amended Complaint asking damages in "a sum equal to twice the consideration agreed to be given," under subdivision (2). But it did not press that motion to decision. On the contrary, the record shows that the Government formally withdrew that motion and instead filed a Second Amended Complaint, again, as in its original complaint, asking damages in "the sum of \$2,000 for each such act," under subdivision (1). It was upon that complaint that it went to trial and all the way to judgment.

Of course, under the express terms of 26 (b), the Government had the right to elect which of the three allowable measures of recovery it would seek, but surely it is possible for the Government at some stage irrevocably to make that election. I agree it did not irrevocably do so by the filing of the original complaint, but I insist that it did so, by filing the Second Amended Complaint and going to trial and all the way to judgment on it. If that conduct did not effect the election, I would ask what could?

It is true that a pretrial conference was held and a pretrial order was entered, under Rule 16 of Fed. Rules Civ. Proc. One of the objects authorized by that Rule is "the simplification of the issues," and another is to consider "The necessity or desirability of amendments to

the pleadings." The order recited that one of the issues of *fact* to be tried was whether the "defendants became and are liable to pay to the United States the sum of \$2,000 for each act committed by them that [may be] determined by the court to be in violation of said statute;" and, under "Issues of law . . . to be litigated upon the trial," the following appears:

"It is the contention of the plaintiff that it is entitled to double the amount of the sales price of the vehicles described in the Second Amended Complaint . . . . Previously the Court has indicated that an irrevocable election has been made by the United States by virtue of *the successive complaints on file*. It is the contention of plaintiff that it is entitled to make its election at any time prior to judgment. Plaintiff elects, *in the event of judgment in its favor*, to receive as liquidated damages a sum equal to twice the consideration agreed to be given to the United States or federal agency involved. Plaintiff respectfully calls this to the attention of the Court so that the point may be preserved for purposes of appeal." (Emphasis added.)

Of course, in simplifying the issues, the Court may, by the pretrial order, define the issues to be tried, *but those issues must be within the pleadings*. And amendments to the pleadings should be freely allowed as Rule 15 provides. But here the Government did not seek leave at the pretrial conference, or at any time after having voluntarily filed its Second Amended Complaint, to amend its pleading. It did not even unconditionally elect at the pretrial conference to proceed under subdivision (2) but only "in the event of judgment in its favor." Instead, it went all the way to trial, and to judgment, on the complaint that sought damages "in the sum of \$2,000 for each such act," and it obtained a judgment on that

UNITED STATES v. HOUGHAM.

7

basis. Surely, that conduct constituted an irrevocable election by the Government to recover damages in the measure claimed in its final complaint, and I think the Government is bound by it.

For the first of these reasons, I would dismiss the appeal, but inasmuch as the Court does not agree, I would, at the minimum, affirm the judgment on the ground that the Government irrevocably elected to recover the measure of damages that it recovered and hence is bound by that election.